TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 736.

GEORGE EELING, APPELLANT.

vs.

THOMAS W. MORGAN, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED DECEMBER 31, 1914.

(24480)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 736.

GEORGE EBELING, APPELLANT.

vs.

THOMAS W. MORGAN, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

	Original.	Print.
Citation and service	1	1
Application for writ of habeas corpus	2	1
Exhibit A. Indictment	9	5
Exhibit B. Order dismissing first count of indictment	16	9
Exhibit C. Judgment and sentence	17	10
Clerk's certificate to exhibits	20	12
Response of Thomas W. Morgan	21	12
Exhibit A. Judgment and sentence	25	14
Exhibit C. Indictment	29	17
Exhibit B. Order dismissing first count of indictment; judgment and sentence on second, third, fourth, fifth, sixth, and seventh counts of indictment, and commitment with return of service thereon	36	21
Clerk's certificate to exhibits	41	24
Motion for judgment, notwithstanding return	42	25
Waiver of production of body	43	25
Opinion, Pollock, J	44	26
Order denying writ of habeas corpus	52	31
Application for an appeal	54	31
Exhibit A. Poverty affidavit	55	32
Order granting leave to prosecute appeal as poor person	56	32
Assignment of errors	57	33
Clerk's certificate to transcript	59	34

1 In the District Court of the United States within and for the First Division of the District of Kansas. In the matter of the application of George Ebeling, ex parte. No. 1504.

Citation on appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Thomas W. Morgan, Esq., warden of the United States penitentiary at Leavenworth, Kansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, A. D. nineteen hundred and fourteen, pursuant to an appeal, filed in the office of the clerk of the district court of the United States within and for the first division of the district of Kansas, wherein George Ebeling is appellant, and you, Thomas W. Morgan, as warden of the United States penitentiary, is respondent, to show cause, if any there be, why the judgment of said district court, rendered on the 13th day of February, 1914, denying a writ of habeas corpus, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John C. Pollock, judge of the district court of the United States, district of Kansas, this 22nd day of July, A. D. nineteen hundred and fourteen.

JOHN C. POLLOCK,
United States District Judge.

Service of above citation admitted this 31st day of July, 1914.

THOS. W. MORGAN,
Warden U. S. Penitentiary, Respondent.

2 In the District Court of the United States within and for the First Division of the State of Kansas. In the matter of the application of George Ebeling, ex parte. No. 1504.

Application for a writ of habeas corpus.

Comes now George Ebeling, and respectfully represents and shows to this honorable court that he is now unlawfully detained, imprisoned, and deprived of his liberty by the honorable Thomas W. Morgan, warden of the United States penitentiary at the city of Leavenworth, in the county of Leavenworth, in the State of Kansas, within the boundaries of the United States of America, and within the jurisdiction of this honorable court.

Your petitioner further states that he is now, and during all of the dates and times hereinafter mentioned has been, a citizen of the United States of America, and that, as such citizen, he is entitled to all of the rights and privileges guaranteed to such citizen by the Constitution of the United States of America.

Your petitioner further states that heretofore, on or about the 28th day of April, 1910, the grand jurors of the United States district court at the city of St. Louis, State of Missouri, returned into said district court a certain indictment against your petitioner (and one William W. Lowe) in seven counts, said cause being entitled The United States v. William W. Lowe and George Ebeling, defendants, numbered 5475, a copy of which said indictment is hereunto annexed, marked "Exhibit A," and made a part of this application.

3 Your petitioner further states that thereafter such proceedings were had in said United States district court at the city of St. Louis, Missouri, before the honorable David P. Dyer, judge; that your petitioner entered a plea of guilty, as charged in each count of such indictment; that thereafter, on the 20th day of May, 1910, your petitioner, by leave of court, withdrew such plea of guilty as to the first count of said indictment; that thereupon the district attorney dismissed such first count as against your petitioner, and said first count was thereupon dismissed by the court, all of which is more fully shown by a copy of the record entry hereunto annexed, marked "Exhibit B," and made a part of this application.

Your petitioner further states that thereafter, on said 20th day of May, 1910, upon such plea of guilty, as charged in the second, third, fourth, fifth, sixth, and seventh counts of such indictment, under and by virtue of section 189 of the Criminal Code, the following judgment and sentence were pronounced by said court upon this petitioner: That he make his fine to United States by the payment of the sum of five hundred ($500.00) dollars and the costs of such prosecution, and that he be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the second count of said indictment; that he make his fine to the United States by the payment of the sum of five hundred ($500.00) dollars, and that he be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term of (3) years, so far as the same relates to the third count of such indictment; that he make his fine to the United States by the payment of the sum of five hundred ($500.00) dollars, and that he be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the period of three (3) years, so far as the same relates to the fourth count of such indictment; that he make his fine to the United States by the payment of the sum of five hundred ($500.00) dollars, and that he be confined and imprisoned in the penitentiary of the United States at Forth Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the fifth count of the indictment; that he make his fine to the United States by the payment of the sum of five hundred ($500.00) dollars, and that he be confined and imprisoned in the penitentiary of the United States at Fort Leaven-

4

worth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the sixth count of the indictment; that he make his fine to the United States by the payment of the sum of five hundred ($500.00) dollars, and that he be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the seventh count of the indictment; that the sentence as to the imprisonment on said seventh count of said indictment begin, run, and terminate concurrently with the sentences imposed under the second, third, fourth, fifth, and sixth counts of said indictment, so that when said George Ebeling shall have satisfied the sentences imposed under said second, third, fourth, fifth, and sixth counts of said indictment he shall be deemed to have satisfied the sentence imposed under the seventh count of said indictment; and that the sentences imposed under said third, fourth, fifth, and sixth counts of the indictment shall run consecutively with the sentence imposed under the second count of said indictment; and that when the said George Ebeling shall have completed the sentence imposed under the second count of the indictment he shall thereupon enter upon the sentence imposed under the third count of said indictment; and that when he shall have completed the sentence imposed under the third count of the said indictment he shall thereupon enter upon the sentence imposed under the fourth count of said indictment; and that when he shall have completed the sentence imposed under the fourth count of said indictment he shall thereupon enter upon the sentence imposed under the fifth count of the said indictment; and that when he shall have completed the sentence imposed under the fifth count of said indictment he shall thereupon enter upon the sentence imposed under the sixth count of said indictment: all of which is more fully shown by a copy of such judgment and sentence hereunto annexed, marked "Exhibit C," and made a part of this application.

Your petitioner further states that thereafter, on the 21st day of May, 1910, upon production of a certified copy of such judgment and sentence, he was received into said penitentiary, where he is now, and ever since said last mentioned date, has been imprisoned and confined, forcibly and against his will, solely by reason of such judgment and sentences aforesaid.

Your petitioner further states that all of such acts, set forth in the second, third, fourth, fifth, sixth, and seventh counts of said indictment, constitutes but one continuous criminal act, with only one criminal intent on the part of your petitioner.

Your petitioner further states that he has served the legal part of such sentences aforesaid, to-wit: Three years on the second count of such indictment, being the first count upon which your petitioner was sentenced; that he has been imprisoned for more than thirty days after the service of such sentence of three (3) years, on the second count of such indictment, for non-payment of such fine and costs; that your petitioner is unable to pay such fines as aforesaid,

and that he should be allowed deduction for good conduct,
6 while in said penitentiary, as provided by law.

Your petitioner further states that such judgment and sentences aforesaid do not provide that your petitioner shall be committed until such fine and costs be paid, in addition to such terms of imprisonment as aforesaid, and that there is no authority in law for detaining your petitioner, by reason of the non-payment of such fines and costs, and such fines and costs constitute a civil obligation only.

Your petitioner further states that such judgment and sentence, so far as the same pertains to such fine and such imprisonment under the third, fourth, fifth, sixth, and seventh counts of such indictment, is null and void, for want of jurisdiction of said court to impose such sentence, upon more than the second count of such indictment, and that such judgment and sentences imposed under the third, fourth, fifth, sixth, and seventh counts constitute no authority for detaining your petitioner in said penitentiary.

Your petitioner further states that ever since the expiration of the service of such sentence, under the second count of such indictment, your petitioner has been, and now is, illegally detained, imprisoned, and deprived of his liberty, in said penitentiary, in involuntary servitude, not as a punishment for any crime against the laws of the United States, or any of its States and Territories, whereof he has been duly convicted, in violation of section 1 of Article XIII of amendments to the Constitution of the United States.

Your petitioner further states that he is now, and ever since the expiration of such valid sentence, has been illegally detained, imprisoned, and deprived of his liberty in said penitentiary, without
due process of law, and is now subjected, for the same offense,
7 to be punished and placed in jeopardy six times, all in violation of Article V of amendments to the Constitution of the United States.

Your petitioner further states that unless he be released by order of this honorable court, in this proceeding, he will be compelled to remain in said penitentiary until all of such six sentences are complied with, to his irreparable loss and injury, and he has no adequate remedy at law, and habeas corpus is the only remedy by which he may be released from said penitentiary by any judicial proceedings.

Your petitioner further states that no previous application for such writ has been made to any other court, justice or judge, superior in power to this court; and that in justice and right all of such sentences under the third, fourth, fifth, sixth, and seventh counts of said indictment should be declared null and void, and your petitioner should be forthwith released from such penitentiary.

Wherefore your petitioner prays that an order to show cause may issue, directed to the Honorable Thomas W. Morgan, warden of said penitentiary, to show cause, if any he has, why a writ of habeas corpus should not issue for the release of your petitioner; and that upon final hearing such writ of habeas corpus may issue,

and your petitioner be released from such illegal imprisonment, and for all proper relief, and your petitioner will ever pray, etc.

GEORGE EBELING,
Petitioner.

FRANS E. LINDQUIST,
Attorney for Petitioner.

MARTIN J. OSTERGARD, Esq.
LEONARD WADDELL, Esq.,
Of Counsel.

UNITED STATES OF AMERICA,
State of Kansas, county of Leavenworth, ss:

George Ebeling, of lawful age, being first duly sworn, says
8 that he is the petitioner in the above entitled cause; that he has read the above and foregoing application, by him subscribed, and that the statements of facts therein contained are true, as he verily believes.

GEORGE EBELING.

Subscribed and sworn to before me this 19th day of August, A. D. 1913. My commission expires January 13, 1915.

[SEAL.] THOS. C. TAYLOR,
Notary Public, Leavenworth County, State of Kansas.

9 EXHIBIT A.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri at the November term thereof, A. D. 1909.

The grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath present: That William W. Lowe and George Ebeling heretofore, to-wit, on the 21st day of January, 1910, at or near Glencoe, in the county of St. Louis, State of Missouri, within the division and district aforesaid, and within the jurisdiction of the court aforesaid, forcibly and by violence, wilfully, knowingly, and feloniously did make an ass'ult upon Henry W. Wray, Frank J. Porter, and Ernest P. Owens, they being then and there railway postal clerks employed in the Postal Service of the United States, and then and there entrusted with the mail of the United States in and upon a certain railway post office, to-wit, railway post office car on train No. 8 of the St. Louis and Kansas City Railway post office on the line of the Missouri Pacific Railway, being then and there in transit from Kansas City, Missouri, to St. Louis, Missouri, they, the said Henry W. Wray, Frank J. Potter, and Ernest P. Owens, then and there having lawful

charge, control, and custody of the said mail of the United States; and the said William W. Lowe and George Ebeling did then and there, forcibly and by violence and by putting in bodily fear the said Henry W. Wray, Frank J. Potter, and Ernest P. Owens, and against the will of the said Henry W. Wray, Frank J. Potter,
10 and Ernest P. Owens, wilfully, knowingly, and feloniously rob, steal, take, and carry away certain mail matter of the United States in the control, charge, and custody of the said Henry W. Wray, Frank J. Potter, and Ernest P. Owens aforesaid, to-wit: A registered letter, No. 224, postmarked Linn, Mo., Jan. 21, 8 a. m., 1910, addressed to the postmaster at St. Louis, Missouri, and containing remittance form 6021, with inclosures of lawful moneys of the United States to the amount of one hundred and fifty-nine ($159.00) dollars, which was in part as follows: One ten dollar silver certificate, 1908, No. A2776540; also one ten-dollar national currency, 1908, No. V197402V; also one ten dollar United States note, 1901, No. B7011283; and certain other moneys, a description of which is to the grand jurors unknown; also numerous other articles of mail matter, a description of which is to the grand jurors unknown and can not therefore be set out in this indictment. And the grand jurors aforesaid do say that the said William W. Lowe and George Ebeling did then and there, in effecting said robbery as aforesaid, put in jeopardy the lives of the said Henry W. Wray, Frank J. Potter, and Ernest P. Owens, railway postal clerks as aforesaid, by the use of dangerous weapons, to-wit, fire-arms known as pistols, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Second count.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That William W. Lowe and George Ebeling heretofore, to-wit, on the 21st day of January, 1910, at or near Glencoe, in the county of St. Louis, State of Missouri, within the division and district aforesaid and within the jurisdiction of this court aforesaid, wilfully, knowingly, and feloniously did tear, cut, and injure a certain pouch, then and there used and designated for use in
11 the conveyance of the mails of the United States, to-wit, mail pouch known as a through registered pouch, made of canvas, with lock No. X9661, and rotary No. 441 attached thereto, said mail pouch containing certain mail of the United States and being then and there in a certain United States railway postal car on train No. 8 of the St. Louis and Kansas City Railway post office, on the line of the Missouri Pacific Railway, and then and there in transit between Kansas City, Missouri, and St. Louis, Missouri, with the intent then and there on the part of the said William W. Lowe and George Ebeling to forcibly, knowingly, and feloniously rob, steal, and carry away the contents of the mail pouch so as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Third count.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That William W. Lowe and George Ebeling heretofore, to-wit, on the 21st day of January, 1910, near Glencoe, in the county of St. Louis, State of Missouri, within the division and district aforesaid, and within the jurisdiction of the court aforesaid, wilfully, knowingly, and feloniously did tear, cut, and injure a certain mail pouch then and there used and designed for use in the conveyance of the mails of the United States, to-wit, mail pouch known as a through registered pouch, made of canvas, with lock No. 11779, rotary No. 252 attached thereto, said mail pouch containing certain mail of the United States, and being then and there in a certain United States railway postal car on train No. 8 of the St. Louis and Kansas City Railway post office on the line of the Missouri Pacific Railway, and then and there in transit between Kansas City, Missouri, and St. Louis, Missouri, with the intent then and there on the part of the said William W. Lowe and George Ebeling to forcibly, knowingly, and feloniously rob, steal, and carry
12 away the contents of the mail pouch so as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Fourth count.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That William W. Lowe and George Ebeling heretofore, to-wit, on the 21st day of January, 1910, near Glencoe, in the county of St. Louis, State of Missouri, within the division and district aforesaid and within the jurisdiction of the court aforesaid, wilfully, knowingly, and feloniously did tear, cut, and injure a certain mail pouch then and there used and designed for use in the conveyance of te mails of the United States, to-wit, mail pouch known as a through registered pouch, made of canvas, with lock No. A142, rotary No. 1028 attached thereto, said mail pouch containing certain mail of the United States and being then and there in a certain United States railway postal car on train No. 8 of the St. Louis and Kansas City Railway post office on the line of the Missouri Pacific Railway, and then and there in transit between Kansas City, Missouri, and St. Louis, Missouri, with the intent then and there on the part of the said William W. Lowe and George Eberling to forcibly, knowingly, and feloniously rob,steal, and carry away the contents o fthe said mail pouch so as aforesaid, contrary to the form of the statute in such case made and provided and against the price and dignity of the United States.

Fifth count.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That William W. Lowe and George Ebeling heretofore, to-

wit, on the 21st day of January, 1910, near Glencoe, in the county of St. Louis, State of Missouri, within the division and district
13 aforesaid, and within the jurisdiction of the court aforesaid, wilfully, knowingly, and feloniously did tear, cut, and injure a certain mail pouch then and there used and designed for use in the conveyance of the mails of the United States, to-wit, mail pouch known as a through registered pouch, made of canvas, with lock No. V1359, rotary No. 21 attached thereto, said mail pouch containing certain mail of the United States and being then and there in a certain United States railway postal car on train No. 8 of the St. Louis and Kansas City Railway post office, on the line of the Missouri Pacific Railway, and then and there in transit between Kansas City, Missouri, and St. Louis, Missouri, with the intent then and there on the part of the said William W. Lowe and George Ebeling to forcibly, knowingly, and feloniously rob, steal, and carry away the contents of the said mail pouch so as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Sixth count.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That William W. Lowe and George Ebeling, heretofore, to wit, on the 21st day of January, 1910, near Glencoe, in the county of St. Louis, State of Missouri, within the division and district aforesaid, and within the jurisdiction of the court aforesaid, wilfully, knowingly, and feloniously did tear, cut, and injure a certain mail pouch then and there used and designed for use in the conveyance of the mails of the United States, to wit, mail pouch known as a through registered pouch, made of canvas, with lock No. X6328, rotary No. 241, attached thereto, said mail pouch containing certain mail of the United States and being then and there in a certain United States railway postal car on train No. 8 of the St. Louis
14 and Kansas City railway post office on the line of the Missouri Pacific Railway and then and there in transit between Kansas City, Missouri, and St. Louis, Missouri, with the intent then and there on the part of the said William W. Lowe and George Ebeling to forcibly, knowingly, and fraudulently rob, steal, and carry away the contents of the said mail pouch so as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Seventh count.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That William W. Lowe and George Ebeling, heretofore, to wit, on the 21st day of January, 1910, near Glencoe, in the county of St. Louis, State of Missouri, within the division and district aforesaid, and within the jurisdiction of the court aforesaid,

wilfully, knowingly, and feloniously did tear, cut, and injure a certain mail pouch then and there used and designed for use in the conveyance of the mails of the United States, to wit, mail pouch known as a through registered pouch, made of canvas, with lock No. V2828, rotary No. 49, attached thereto, said mail pouch containing certain mail of the United States and being then and there in a certain United States railway postal car on train No. 8 of the St. Louis and Kansas City railway post office and then and there in transit between Kansas City, Missouri, and St. Louis, Missouri, with the intent then and there on the part of the said William Lowe and George Ebeling to forcibly, knowingly, and feloniously rob, steal, and carry away the contents of the said mail pouch so as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

CHARLES A. HOUTS,
United States Attorney.

15 (Endorsed:) #5475. United States District Court, Eastern Division of the Eastern Judicial District of Missouri. The United States vs. William W. Lowe and George Ebeling. Indictment for violation of sec. 197 and sec. 189, Penal Code. A true bill. W. H. Sweetin, foreman grand jury. Filed April 28th, 1910. W. W. Nall, clerk. Charles A. Houts, U. S. attorney.

16 EXHIBIT B.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the District Court of the United States in and for the Eastern Division of said Judicial District. May term, A. D. 1910. Friday, May 20th, 1910.

THE UNITED STATES, PLAINTIFF, 5475 *vs.* WILLIAM W. LOWE AND GEORGE Ebeling, defendants.	Indictment for violation of sections 189 and 197, pages 1124 and 1126, vol. 35, part I, United States Statutes at Large.

This day comes the United States, by district attorney, and the said defendant, George Ebeling, being present in court in custody of the marshal, the said defendant, with the leave of court, withdraws the plea of guilty heretofore entered to the first count of the indictment herein against him. And thereupon the said district attorney says that he will not further prosecute the said defendant, George Ebeling, upon the first count of the indictment herein against him, and asks that the said indictment as to said first count be now dismissed.

It is therefore now considered by the court that the indictment in this cause, so far as the same relates to the first count therein con-

tained, be, and the same is hereby, now dismissed, and that the said defendant, George Ebeling, be released and discharged from further prosecution upon the said first count of said indictment. And that as to said count he go hence without day, &c.

17 EXHIBIT C.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the District Court of the United States in and for the Eastern Division of said Judicial District. May term, A. D. 1910. Friday, May 20th, A. D. 1910.

THE UNITED STATES, PLAINTIFF, 5475 *vs.* WILLIAM W. LOWE AND GEORGE Ebeling, defendants.	Indictment for violation of sections 189 and 197, pages 1124 and 1126, vol. 35, part 1, United States Statutes at Large.

This day comes the United States, by district attorney, and the said defendant, George Ebeling, being present in court in custody of the marshal, the district attorney asks the judgment and sentence of the court upon the plea of guilty heretofore entered by the said defendant, George Ebeling, as to the charges as contained in the second, third, fourth, fifth, sixth, and seventh counts of the indictment herein against him;

And the said defendant, having nothing further to say after demand made of him why such judgment and sentence should not be rendered,

It is therefore now considered by the court, and as the judgment and sentence of the court upon the said plea of guilty, so entered as aforesaid, that he, the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500) dollars, and also the costs of the prosecution of this cause to be taxed; and that the said defendant, George Ebeling, be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term
18 of three (3) years, so far as the same relates to the second count of the indictment in this cause.

And it is further considered by the court that the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500) dollars; and that he be confined and imprisoned in the penitentiary of the United States, at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the third count of the indictment in this cause.

And it is further considered by the court that the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500) dollars; and that he be confined

and imprisoned in the penitentiary of the United States, at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the fourth count of the indictment in this cause.

And it is further considered by the court that the defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500) dollars; and that he be confined and imprisoned in the penitentiary of the United States, at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the fifth count of the indictment in this cause.

And it is further considered by the court that the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500) dollars; and that he be confined and imprisoned in the penitentiary of the United States, at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the sixth count of the indictment in this cause.

And it is further considered by the court that he, the
19 said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500) dollars; and that he be confined and imprisoned in the penitentiary of the United States, at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the seventh count of the indictment in this cause; but that the sentence as to the imprisonment on the said seventh count of the said indictment begin, run, and terminate concurrently with the sentences imposed under the second, third, fourth, fifth, and sixth counts of the said indictment, so that when the said defendant, George Ebeling, shall have satisfied the sentences imposed under the said second, third, fourth, fifth, and sixth counts of said indictment he shall be deemed to have satisfied the sentence imposed under the seventh count of said indictment; and that the sentences imposed under the said third, fourth, fifth, and sixth counts of the indictment shall run consecutively with the sentence imposed under the second count of said indictment; and that when the said defendant, George Ebeling, shall have completed the sentence imposed under the second count of the said indictment he shall thereupon enter upon the sentence imposed under the third count of the said indictment; and that when he shall have completed the sentence imposed under the third count of said indictment he shall thereupon enter upon the sentence imposed under the fourth count of the said indictment; and that when he shall have completed the sentence imposed under the fourth count of the said indictment he shall thereupon enter upon the sentence imposed under the fifth count of the said indictment; and that when he shall have completed the sentence imposed under the fifth count of the said indictment he shall thereupon enter upon the sentence imposed under the sixth count of the said indictment.

And the marshal of the said United States, in and for the
20 said eastern district of Missouri, is hereby directed to deliver the said prisoner, together with a duly certified copy of this judgment and sentence to the warden of the United States Penitentiary, at Fort Leavenworth, in the State of Kansas.

And it is further ordered that a commitment issue in this cause, directed to the said marshal, upon which he make return as to the execution of this judgment and sentence.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

I, W. W. Nall, clerk of the District Court of the United States, in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the writing hereto attached is a true copy of indictment, order of dismissal of first count of indictment against George Ebeling, and judgment and sentence against George Ebeling, in case No. 5475 of United States, plaintiff, *vs.* William W. Lowe and George Ebeling, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in
[SEAL.] the eastern division of said district, this fourteenth day of August, in the year of our Lord nineteen hundred and thirteen.

W. W. NALL,
Clerk of said Court.
EDWARD W. TOBIN, *Deputy.*

(Endorsed on back:) No. 5475. United States District Court, Eastern Division of the Eastern Judicial District of Missouri. The United States against William W. Lowe and George Ebeling. Duly certified copy of indictment, order of dismissal of first count of indictment against Ebeling, and judgment and sentence against Ebeling in the above-entitled cause.

(Endorsed:) No. 1504. In the district court of the United States within and for the first division of the district of Kansas. In the matter of the application of George Ebeling ex parte. Application for a writ of habeas corpus. Filed Dec. 26, 1913, Morton Albaugh, clerk. Frans E. Lindquist, attorney for petitioner.

21 In the District Court of the United States, District of Kansas, First Division. In the matter of the application of George Ebeling for writ of habeas corpus. No. ——.

Response.

Comes now Thomas W. Morgan, and for a response to the petition herein, says that he is the duly appointed, qualified, and acting warden of the United States Penitentiary at Leavenworth, Kansas,

and as such warden he now has in custody, as a prisoner in said institution, the said George Ebeling, the petitioner herein, and that said George Ebeling is detained as a prisoner in said penitentiary under and by virtue of a commitment issued out of the District Court of the United States for the Eastern District of Missouri at St. Louis in said district on the 20th day of May, 1910. A copy of said commitment is hereto attached, marked Exhibit A, and by this reference made a part hereof.

Said George Ebeling was received at said penitentiary the 21st day of May, 1910, A. D., and is still detained therein.

Respondent further shows to the court that the said George Ebeling was indicted by the grand jury of the United States in the Eastern District of Missouri, at St. Louis, on the 28th day of April, 1910, on an indictment containing seven counts.

The first count thereof charged a violation of section 197 of the Criminal Code of the United States. The second count and remaining counts of said indictment charged a violation of section 189 of said code.

22 Respondent further shows and avers that on the 28th day of May, 1910, the said George Ebeling was arraigned and required to plead to said indictment and to each count thereof. That thereupon the said George Ebeling entered a plea of guilty to all of the several counts set forth in said indictment. That thereupon and before sentences was pronounced by the court, by leave of the court, the defendant was permitted to withdraw his plea of guilty to the first count of said indictment, and said first count was thereupon dismissed, and that thereafter on the same day, the said George Ebeling entered a plea of guilty, severally, to each and all of the remaining counts of said indictment, as more fully appears in the duly certified copy of the transcript of the record hereto attached, marked Exhibit B, and by this reference made a part hereof.

Respondent further shows to the court and avers, that upon the defendant's plea of guilty to said indictment, as aforesaid, the Honorable David P. Dyer, judge of the United States District Court for the Eastern District of Missouri, pronounced sentences upon the said petitioner upon his plea of guilty as aforesaid, and ordered and adjudged that said petitioner pay a fine of five hundred ($500) dollars, and be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term of three years on the second, third, fourth, fifth, sixth, and seventh counts of said indictment, and that said sentences on each of the said several counts run consecutively, except as to the sentence on the seventh count of said indictment, which said sentence on seventh count, the court ordered and adjudged to run concurrently with the sentences imposed on the second, third, fourth, fifth, and sixth counts, as more fully appears in said transcript hereto attached.

Respondent further shows to the court that the said second,
23 third, fourth, fifth, sixth, and seventh counts of said indictment, each severally charged the defendant with the crime of un-

lawfully and feloniously cutting, injuring, and destroying certain registered mail pouches containing mail matter, and other property in custody of the United States, with the intent to feloniously rob, steal, and carry away the contents of said pounches and each of them as more fully appears in the duly certified copy of said indictment hereto attached, marked Exhibit C and by this reference made a part hereof, in violation of section 189 of the Criminal Code of the United States.

And this respondent is informed and believes that said indictment was returned upon proper evidence, lawfully adduced, and that the grand jury of said court duly and lawfully found and determined that said charges in said indictment were true, as therein set forth, and that said sentences imposed upon the petitioner upon his plea of guilty, and each of them, were legal and valid.

This respondent further shows to the court and avers that he stands ready to produce the body of said George Ebeling, whenever lawfully required, and to do whatever he may lawfully be required to do in the premises.

THOMAS W. MORGAN, *Respondent.*
L. S. HARVEY, *Asst. U. S. Atty.*

STATE OF KANSAS,
County of Leavenworth, ss:

Thomas W. Morgan, being duly sworn, on oath says that he is the duly appointed, qualified, and acting warden of the United States Penitentiary at Leavenworth, Kansas. That he has read the within and foregoing response and knows the contents thereof, and that all the positive statements therein contained are true, and that such statements that are made upon information and be-
24 lief, respondent believes them to be true.

THOMAS W. MORGAN.

Subscribed and sworn to before me this 10th day of January, 1914.
[SEAL.] THOS. C. TAYLOR, *Notary Public.*
My commission expires January 13, 1915.

25 EXHIBIT A.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the district court of the United States in and for the eastern division of said judicial district. May Term, A. D. 1910. Friday, May 20th, A. D. 1910.

THE UNITED STATES, PLAINTIFF, *vs.* WILLIAM W. LOWE AND GEORGE EBERLING, defendants.	Indictment for violation of sections 189 and 197, pages 1124 and 1126, vol. 35, part 1, United States Statutes at large.

This day comes the United States, by district attorney, and the said defendant, George Ebeling, being present in court in custody

of the marshal, the district attorney asks for judgment and sentence of the court upon the plea of guilty heretofore entered by the said defendant, George Ebeling, as to the charge contained in the second, third, fourth, fifth, sixth, and seventh counts of the indictment herein against him;

And the said defendant, having nothing further to say after demand made of him why such judgment and sentence should not be so rendered;

It is, therefore, now considered by the court and as the judgment and sentence of the court upon the said plea of guilty, so entered as aforesaid, that he, the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500) dollars, and also the costs of the prosecution of this cause to be taxed; and that the said defendant, George Ebeling, be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the
26 term of three (3) years, so far as the same relates to the second count of the indictment in this cause.

And it is further considered by the court that the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500) dollars; and that he be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the third count of the indictment in this cause.

And it is further considered by the court that the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500) dollars; and that he be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the fourth count of the indictment in this cause.

And it is further considered by the court that the defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500) dollars; and that he be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the fifth count of the indictment in this cause.

And it is further considered by the court that the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500) dollars; and that he be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the sixth count of the indictment in this cause.

27 And it is further considered by the court that the said defendant, George Ebeling, make his fine to the United

States by the payment of the sum of five hundred ($500) dollars; and that he be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years so far as the same relates to the seventh count of the indictment in this cause; but that the sentence as to the imprisonment on the said seventh count of the said indictment begin, run, and terminate concurrently with the sentences imposed under the second, third, fourth, fifth, and sixth counts of the said indictment, so that when the said defendant, George Ebeling, shall have satisfied the sentences imposed under the said second, third, fourth, fifth, and sixth counts of said indictment he shall be deemed to have satisfied the sentence imposed under the seventh count of said indictment; and that the sentences imposed under the said third, fourth, fifth, and sixth counts of the indictment shall run consecutively with the sentence imposed under the second count of said indictment; and that when the said defendant, George Ebeling, shall have completed the sentence imposed under the second count of the said indictment, he shall thereupon enter upon the sentence imposed under the third count of the said indictment; and that when he shall have completed the sentence imposed under the third count of said indictment, he shall thereupon enter upon the sentence imposed under the fourth count of the said indictment; and that when he shall have completed the sentence imposed under the fourth count of the said indictment, he shall thereupon enter the sentence imposed under the fifth count of the said indictment; and that when he shall have completed the sentence imposed under the fifth count of the said indictment he shall thereupon enter upon the sentence imposed under the sixth count of the said indictment.

And the marshal of the United States in and for the said
28 eastern district of Missouri is hereby directed to deliver the said prisoner, together with a due and certified copy of this judgment and sentence, to the warden of the United States Penitentiary at Fort Leavenworth in the State of Kansas.

And it is further ordered that a commitment issue in this cause, directed to the said marshal, upon which he make return as to the execution of this judgment and sentence.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

I. W. W. Nall, clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the writing hereto attached is a true copy of the judgment and sentence of the court, case No. 5475, of the United States, plaintiff, vs. George Ebeling, defendant, as fully as the same remains of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in city of St. Louis, in the eastern division of said district, this 20th day of May, in the year of our Lord 1910.

[SEAL.] (Signed) W. W. NALL,
Clerk of said Court.

A true copy.

A. J. RENOE, *Record Clerk.*

LEAVENWORTH, KANSAS, *January 8, 1914.*

29 EXHIBIT C.

(Indictment.)

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the District Court of the United States in and for the eastern division of the eastern judicial district of Missouri at the November term thereof, A. D. 1909.

The grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath present: That William W. Lowe and George Ebeling, heretofore, to-wit: On the 21st day of January, 1910, at or near Glencoe, in the county of St. Louis, State of Missouri, within the division and district aforesaid and within the jurisdiction of the court aforesaid, forcibly and by violence, wilfully, knowingly, and feloniously did make an ass'ult upon Henry W. Wray, Frank J. Potter, and Ernest P. Owens, they being then and there railway postal clerks employed in the Postal Service of the United States, and then and there entrusted with the mail of the United States in and upon a certain railway post office, to-wit: Railway post office car on train No. 8 of the St. Louis and Kansas City Railway post office on the line of the Missouri Pacific Railway, being then and there in transit from Kansas City, Missouri, to St. Louis, Missouri, they, the said Henry W. Wray, Frank J. Potter, and Ernest P. Owens, then and there having lawful charge, control, and custody of the said mail of the United States; and the said William W. Lowe and George Ebeling did then and there forcibly and by violence and by putting in bodily fear the said Henry W. Wray, Frank J. Potter, and Ernest P. Owens, and against the will of the said Henry W. Wray,
30 Frank J. Potter, and Ernest P. Owens, wilfully, knowingly, and feloniously rob, steal, take, and carry away certain mail matter of the United States in the control, charge, and custody of the said Henry W. Wray, Frank J. Potter, and Ernest P. Owens aforesaid, to-wit: A registered letter, No. 234, postmarked Linn, Mo., Jan. 21, 8 a. m., 1910, addressed to the postmaster at St. Louis, Missouri, and containing remittance form 6021, with inclosures of lawful moneys of the United States to the amount of one hundred

and fifty-nine ($159.00) dollars, which was in part as follows: One ten dollar silver certificate, 1908, No. A2776540; also one ten dollar national currency, 1908, No. V197402V; also one ten dollar United States note, 1901, No. B7011283; and certain other moneys, a description of which is to the grand jurors unknown; also numerous other articles of mail matter, a description of which is to the grand jurors unknown and can not therefore be set out in this indictment. And the grand jurors aforesaid do say that the said William W. Lowe and George Ebeling did then and there, in effecting said robbery as aforesaid, put in jeopardy the lives of the said Henry W. Wray, Frank J. Potter, and Ernest P. Owens, railway postal clerks, as aforesaid, by the use of dangerous weapons, to-wit, firearms known as pistols, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Second count.

And the grand jurors aforesaid on their oath aforesaid do further present that William W. Lowe and George Ebeling, heretofore, to-wit: On the 21st day of January, 1910, at or near Glencoe, in the county of St. Louis, State of Missouri, within the division and district aforesaid, and within the jurisdiction of this court aforesaid, wilfully, knowingly, and feloniously did tear, cut, and injure a certain mail pouch then and there used and designed for use
31 in the conveyance of the mails of the United States, to-wit, mail pouch known as a through registered pouch, made of canvas, with lock No. X9661, and rotary No. 441 attached thereto, said mail pouch containing certain mail of the United States and being then and there in a certain United States railway postal car on train No. 8 of the St. Louis and Kansas City Railway post office on the line of the Missouri Pacific Railway and then and there in transit between Kansas City, Missouri, and St. Louis, Missouri; with the intent then and there on the part of the said William W. Lowe and George Ebeling to forcibly, knowingly, and feloniously rob, steal, and carry away the contents of the mail pouch so as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Third count.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That William W. Lowe and George Ebeling, heretofore, to wit, on the 21st day of January, 1910, near Glencoe, in the county of St. Louis, State of Missouri, within the division and district aforesaid, and within the jurisdiction of the court aforesaid, wilfully, knowingly, and feloniously did tear, cut, and injure a certain mail pouch then and there used and designed for use in the conveyance of the mails of the United States, to wit, mail pouch known as a through registered pouch, made of canvas, with lock No. 11779,

rotary No. 252, attached thereto, said mail pouch containing certain mail of the United States and being then and there in a certain United States railway postal car on train No 8 of the St. Louis and Kansas City Railway post office on the line of the Missouri Pacific Railway and then and there in transit between Kansas City, Missouri, and St. Louis, Missouri, with the intent then and there on the part of the said William W. Lowe and George Ebeling to
32 forcibly, knowingly, and feloniously rob, steal, and carry away the contents of the mail pouch so as aforesaid, contrary to the form the statute in such case made and provided, and against the peace and dignity of the United States.

Fourth count.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That William W. Lowe and George Ebeling, heretofore, to wit, on the 21st day of January, 1910, near Glencoe, in the county of St. Louis, State of Missouri, within the division and district aforesaid, and within the jurisdiction of the court aforesaid, wilfully, knowingly, and feloniously did tear, cut, and injure a certain mail pouch then and there used and designed for use in the conveyance of the mails of the United States, to wit, mail pouch known as a through registered pouch, made of canvas, with lock No. A142, rotary No. 1028, attached thereto, said mail pouch containing certain mail of the United States and being then and there in a certain United States railway postal car on train No. 8 of the St. Louis and Kansas City Railway post office on the line of the Missouri Pacific Railway, and then and there in transit between Kansas City, Missouri, and St. Louis, Missouri, with the intent then and there on the part of the said William W. Lowe and George Ebeling to forcibly, knowingly, and feloniously rob, steal, and carry away the contents of the said mail pouch so as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Fifth count.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That William W. Lowe and George Ebeling, heretofore, to wit, on the 21st day of January, 1910, near Glencoe, in the county of St. Louis, State of Missouri, within the division
33 and district aforesaid, and within the jurisdiction of the court aforesaid, wilfully, knowingly, and feloniously did tear, cut, and injure a certain mail pouch then and there used and designed for use in the conveyance of the mails of the United States, to wit, mail pouch known as a through registered pouch, made of canvas, with lock No. V1359, rotary No. 21, attached thereto, said mail pouch containing certain mail of the United States, and being then and there in a certain United States railway postal car on

train No. 8 of the St. Louis and Kansas City Railway post office on the line of the Missouri Pacific Railway, and then and there in transit between Kansas City, Missouri, and St. Louis, Missouri, with the intent then and there on the part of the said William W. Lowe and George Ebeling to forcibly, knowingly, and feloniously rob, steal, and carry away the contents of the said mail pouch so as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Sixth count.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That William W. Lowe and George Ebeling, heretofore, to wit, on the 21st day of January, 1910, near Glencoe, in the county of St. Louis, State of Missouri, within the division and district aforesaid, and within the jurisdiction of the court aforesaid, wilfully, knowingly, and feloniously did tear, cut, and injure a certain mail pouch then and there used and designed for use in the conveyance of the mails of the United States, to wit, mail pouch known as a through registered pouch, made of canvas, with lock No. X6328, rotary No. 241, attached thereto, said mail pouch containing certain mail of the United States and being then and there in
34 a certain United States railway postal car on train No. 8 of the St. Louis and Kansas City railway post office on the line of the Missouri Pacific Railway and then and there in transit between Kansas City, Missouri, and St. Louis, Missouri, with the intent then and there on the part of the said William W. Lowe and George Ebeling to forcibly, knowingly, and fraudulently rob, steal, and carry away the contents of the said mail pouch so as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Seventh count.

And the grand jurors aforesaid, on their oath aforesaid, do further present: That William W. Lowe and George Ebeling, heretofore, to wit, on the 21st day of January, 1910, near Glencoe, in the county of St. Louis, State of Missouri, within the division and district aforesaid, and within the jurisdiction of the court aforesaid, wilfully, knowingly, and feloniously did tear, cut, and injure a certain mail pouch then and there used and designed for use in the conveyance of the mails of the United States, to wit, mail pouch known as a through registered pouch, made of canvas, with lock No. V2828, rotary No. 49 attached thereto, said mail pouch containing certain mail of the United States and being then and there in transit between Kansas City, Missouri, and St. Louis, Mis-
of the St. Louis and Kansas City Railway post office and then and there in transit between Kansas City, Missouri, and St. Louis, Mis-

souri, with the intent then and there on the part of the said William Lowe and George Ebeling to forcibly, knowingly, and feloniously rob, steal, and carry away the contents of the said mail pouch so as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

CHARLES A. HOUTS,
United States Attorney.

35 (Endorsed:) #5475. United States District Court, Eastern Division of the Eastern Judicial District of Missouri. The United States vs. William W. Lowe and George Ebeling. Indictment for violation of sec. 196 and sec. 189, Penal Code. A true bill. W. H. Sweetin, foreman grand jury. Filed April 28th, 1910. W. W. Nall, clerk. Charles A. Houts, U. S. attorney.

36 EXHIBIT B.

Judgment and sentence.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

In the District Court of the United States in and for the Eastern Division of said Judicial District. May term, A. D. 1910. Friday, May 20th, 1910.

THE UNITED STATES, PLAINTIFF, 5475 *vs.* WILLIAM W. LOWE AND GEORGE Ebeling, defendants.	Indictment for violation of sections 189 and 197, pages 1124 and 1126, vol. 35, part 1, United States Statutes at Large.

This day comes the United States, by district attorney, and the said defendant, George Ebeling, being present in court in custody of the marshal, the said defendant with the leave of court withdraws the plea of guilty heretofore entered to the first count of the indictment herein against him. And thereupon the said district attorney says that he will not further prosecute the said defendant, George Ebeling, upon the first count of the indictment herein against him, and asks that the said indictment as to said first count be now dismissed.

It is therefore now considered by the court that the indictment in this cause, so far as the same relates to the first count therein contained, be, and the same is hereby now dismissed, and that the said defendant, George Ebeling, be released and discharged from further prosecution upon the first count of said indictment. And that as to said count he go hence without day, &c.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

37 In the District Court of the United States in and for the Eastern Division of said Judicial District. May term, A. D. 1910. Friday, May 20th, 1910.

THE UNITED STATES, PLAINTIFF, 5475 *vs.* WILLIAM W. LOWE AND GEORGE Ebeling, defendants.	Indictment for violation of sections 189 and 197, pages 1124 and 1126, vol. 35, part 1, United States Statutes at Large.

This day comes the United States, by district attorney, and the said defendant, George Ebeling, being present in court in custody of the marshal, the district attorney asks the judgment and sentence of the court upon the plea of guilty heretofore entered by the said defendant, George Ebeling, as to the charges as contained in the second, third, fourth, fifth, sixth, and seventh counts of the indictment herein against him.

And the said defendant, having nothing further to say after demand made of him why such judgment and sentence should not be so rendered.

It is, therefore, now considered by the court and as the judgment and sentence of the court, upon the said plea of guilty, so entered as aforesaid, that he, the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500.00) dollars, and also the costs of the prosecution of this cause to be taxed; and that the said defendant, George Ebeling, be confined and imprisoned in the penitentiary of the United States, at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the second count of the indictment in this cause.

And it is further considered by the court that the said de-
38 fendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500.00) dollars, and that he be confined and imprisoned in the penitentiary of the United States, at Fort Leavenworth, in the State of Kansas, for and during the term of three years, so far as the same relates to the third count of the indictment in this cause.

And it is further considered by the court that the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500.00) dollars, and that he be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the fourth count of the indictment in this cause.

And it is further considered by the court that the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500.00) dollars, and that he be confined

and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the fifth count of the indictment in this cause.

And it is further considered by the court that the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500.00) dollars, and that he be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the sixth count of the indictment in this cause.

And it is further considered by the court that he, the said defendant, George Ebeling, make his fine to the United States by the payment of the sum of five hundred ($500.00) dollars, and that he be confined and imprisoned in the penitentiary of the United States at Fort Leavenworth, in the State of Kansas, for and during the term of three (3) years, so far as the same relates to the seventh
39 count of the indictment in this cause, but that the sentence as to the imprisonment on the seventh count of the said indictment begin, run, and terminate concurrently with the sentence imposed under the second, third, fourth, fifth, and sixth counts of the said indictment, so that when the said defendant, George Ebeling, shall have satisfied the sentences imposed under the said second, third, fourth, fifth, and sixth counts of the indictment he shall be deemed to have satisfied the sentence imposed under the seventh count of said indictment, and that the sentence imposed under the said third, fourth, fifth, and sixth counts of the indictment shall run consecutively with the sentence imposed under the second count of said indictment; and that when said defendant, George Ebeling, shall have completed the sentence imposed under the second count of the said indictment he shall thereupon enter upon the sentence imposed under the third count of the said indictment; and that when he shall have completed the sentence imposed under the third count of the said indictment he shall thereupon enter upon the sentence imposed under the fourth count of the said indictment; and that when he shall have completed the sentence under the fourth count of said indictment he shall thereupon enter upon the sentence imposed under the fifth count of said indictment; and that when he shall have completed the sentence imposed under the fifth count of said indictment he shall thereupon enter upon the sentence imposed under the sixth count of said indictment.

And the marshal of the United States in and for the said Eastern District of Missouri is hereby directed to deliver the said prisoner, together with a duly certified copy of this judgment and sentence to the warden of the United States penitentiary at Fort Leavenworth, in the State of Kansas.

And it is further ordered that a commitment issue in this cause, directed to the said marshal, upon which he make return as to the execution of this judgment and sentence.

40 *Commitment.*

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, ss:

The President of the United States of America to the marshal of the Eastern District of Missouri, greeting:

You are hereby commanded to take and deliver to the warden of the penitentiary of the United States, at Ft. Leavenworth, Kansas, the body of George Ebeling, together with a duly certified copy of the judgment and sentence of our said court entered against him, the said George Ebeling, at the May term of said court, to wit, on the 20th day of May, A. D. 1910. Hereof fail not, and have you this writ before this court with your return thereon upon the due execution thereof.

Witness the Honorable David P. Dyer, judge of the District Courts of the United States within and for the Eastern District of Missouri, this 20th day of May, A. D. nineteen hundred and ten. Issued at office in the city of St. Louis, under the seal of said district court, the day and year last aforesaid.

[SEAL.]

W. W. NALL,
Clerk of said court.

Return.

UNITED STATES OF AMERICA,
Eastern District of the Eastern Judicial District of Missouri, ss:

I hereby certify that I executed the within writ on the 21st day of May, A. D. 1910, by delivering the body of George Ebeling, together with a duly certified copy of the judgment and sentence in the within cause, to the warden of the Federal Penitentiary, at Leavenworth, Kans.

WM. L. MORSEY, *U. S. Marshal.*
By J. J. WILLIAMS, *Deputy.*

41 UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, ss:

I, W. W. Nall, clerk of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify that the writing hereto attached is a true copy of the indictment order dated May 20th, 1910, of judgment and sentence and writ of commitment in case No. 5475, of United States of America, plaintiff, vs. William W. Lowe and George Ebeling, defendants, as fully as the same remains on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in the eastern division of said district, this 3rd day of January, in the year of our Lord nineteen hundred and fourteen.

[SEAL.]

W. W. NALL,
Clerk of said court.

(Endorsed on back:) No. 5475, United States District Court, Eastern Division of the Eastern Judicial District of Missouri. The United States of America, plaintiff, against William W. Lowe and George Ebeling, defendants. Duly certified copy of the indictment order dated May 20th, 1910, judgment and sentence and the commitment in the above-entitled cause.

(Endorsed:) No. 1504, in the matter of the application of George Ebeling for writ of habeas corpus. Response. Filed Jany. 12, 1914. Morton Albaugh, clerk. Fred Robertson, U. S. attorney for respondent.

42 In the District Court of the United States within and for the First Division of the District of Kansas. In the matter of the application of George Ebeling, ex parte. No. 1504.

Motion for judgment notwithstanding return.

Comes now the above-named George Ebeling and moves this honorable court to render its judgment granting a writ of habeas corpus, as prayed for in the application heretofore filed, for the reason following:

Because said return of Thomas W. Morgan does not state facts sufficient to justify the denying of such application for a writ of habeas corpus.

FRANS E. LINDQUIST,
Attorney for Petitioner.

MARTIN J. OSTERGARD,
H. D. KISSENGER,
LEONARD WADDELL,
Of Counsel.

(Endorsed:) No. 1504. In the District Court of the United States within and for the First Division of the District of Kansas. In the matter of the application of George Ebeling, ex parte. Motion for judgment notwithstanding return. Filed Jany. 12, 1914. Morton Albaugh, clerk. Frans E. Lindquist, attorney for petitioner; Martin J. Ostergard, H. D. Kissenger, Leonard Waddell, of counsel.

43 In the District Court of the United States within and for the First Division of the District of Kansas. January term, 1914. In the matter of the application of George Ebeling, ex parte. No. 1504.

Waiver of production of body.

I, George Ebeling, the petitioner in the above-entitled cause, do hereby waive the production of my body at the hearing and determination of the application for a writ of habeas corpus.

GEORGE EBELING, *Petitioner.*

FRANS E. LINDQUIST,
Attorney for Petitioner.

(Endorsed:) No. 1504. In the District Court of the United States within and for the First Division of the District of Kansas. In the matter of the application of George Ebeling, ex parte. Waiver of production of body. Frans E. Lindquist, attorney for petitioner. Filed Feb. 12, 1914. Morton Albaugh, clerk.

44 In the District Court of the United States for the District of Kansas, First Division. In the matter of the application of George Ebeling for writ of habeas corpus. No. 1504.

Memoranda of decision.

Petitioner was indicted, pleaded guilty, and was sentenced on six counts in an indictment charging him with violation of §189 of the Code of Criminal Procedure, which reads as follows:

"Whoever shall, tear, cut, or otherwise injure any mail bag, pouch, or other thing used or designed for use in the conveyance of the mail, or shall draw or break any staple, or loosen any part of any lock, chain, or strap attached thereto, with intent to rob or steal any such mail, or to render the same insecure, shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both."

On five of the counts he was sentenced to three years in the Federal penitentiary and to pay a fine of five hundred dollars on each count, said sentences of imprisonment to run cumulatively. On the remaining count, charging a violation of such statute, he was sentenced to three years imprisonment in the penitentiary, the same to run concurrently with the terms of imprisonment imposed under the preceding five counts. Thus the aggregate sentence imposed upon petitioner was fifteen years imprisonment in the Federal penitentiary at Leavenworth, a fine of twenty-five hundred dollars, and costs of the prosecution. However, as petitioner was not adjudged to stand committed until the fine and costs were paid, such portion of the judgment may be omitted from consideration of the matter here presented. (Ex parte Jackson, 96, U. S.
45 727.) Petitioner having served the full period of three years, the utmost length of imprisonment within the power of the court to impose for a single violation of the statute, has filed his application for writ of habeas corpus praying his release from further imprisonment.

This application is based on the ground the indictment, although in several counts in legal effect, charges but one violation of the act above quoted; hence it was not within the jurisdiction or power of the trial court to impose a greater punishment by way of imprisonment than is permitted by the statute—three years—which he has already undergone. Hence, the remainder of the term of imprisonment is coram non judice and void.

As all the registered mail pouches specifically described and numbered in the several counts of the indictment were cut into as a part of the same criminal transaction, were located in the same place, if

under the terms of the act properly construed such transaction constituted but one completed offense, it is evident the court was without power to impose more than one three-year term of imprisonment under the statute, and in consequence the remainder of the term is void and the writ must be granted. (In re Snow, 120 U. S., 274; Hans Nielson, petitioner, 131 U. S., 176; Halligan v. Wayne, 179 Fed., 112; Munson v. McCluaghry, 198 Fed., 72; Stevens v. McClaughry, 207 Fed., 18.)

However, if, as contended by the Government, and as manifestly held by the trial court in imposing the punishment against petitioner, each single isolated act of cutting into the several registered mail pouches described in the indictment with the intent in his mind of stealing therefrom the contents of such pouches, constituted a separate and independent violation of the act, then the judgment is valid in its entirety and the writ must be denied.

46 That is to say, the question presented by the application for the writ and response of the warden thereto is this: Under the act in question, does he who cuts into many registered mail pouches containing registered mail, with the intent of stealing the contents of all of such sacks, violate the statute in any larger sense or incur liability to any greater punishment therefor than he who, with like intent, cuts open but one such pouch?

A reading and consideration of the act renders it quite clear the purpose of the law making power in the enactment thereof was not to protect the Government in its property rights in the receptacles used or designed for the transportation of the mails from despoilment, but was to secure protection for the mails therein contained.

Again, in affording such protection to the mails Congress did not deem it sufficient to provide in general terms against anyone robbing or attempting to rob a person in possession of such mails, or against stealing or attempting to steal the mails from such receptacles or from cutting or tearing into such receptacles for mail or attempting to cut or tear into the same. On the contrary, the statute in express terms condemns the act of cutting, tearing, or in any like manner injuring any mail pouch or sack with intent of stealing or rendering the mailable matter therein insecure. In other words, the overt act done which is prohibited is the cutting or injuring of the container of the mail matter. The criminal intent which must accompany the doing of the prohibited act is the larceny of or the rendering insecure of the mail matter contained in the pouch or sack.

Under such legislative act is a completed and punishable offense committed by the cutting, tearing or injuring of each separate

47 mail sack or mail pouch, if the act of cutting or tearing be accompanied by the prohibited intent, although the successive forbidden acts of cutting or tearing follow each other in such rapid succession as to form one continuous chain of events?

No construction of the act in question by any court has been found. It has been held the burglary of a post-office building with intent to commit larceny therein, and the actual commission of the intended

larceny constitute but one punishable offense, and that of either burglary or larceny as the Government may elect. (Munson v. McClaughry, supra.) The larceny of a registered mail pouch and its contents, however numerous the parcels may be, and the embezzlement of such contents, constitute but one offense. (Stevens v. McClaughry, supra.) The wounding or killing of two or more persons by the firing of one shot constitutes but one offense. (State v. Damon, 2 Tyler, 387; Clem v. The State, 42 Ind., 420; Ben v. The State, 22 Ala., 9.) That an act prohibiting Sunday labor is violated to no greater extent by the sale of six loaves of bread than by the sale of one. (Crepps v. Durden, Cowper, 640.) That the larceny of goods belonging to different individuals done at the same time and place constitutes but one offense. (Nichols v Commonwealth, 78 Mass., 180; Wilson v. State, 45 Texas, 76; State v. Williams, 10 Humph. (Tenn.), 101; Lorton v. The State, 7 Mo., 55; State v. Morphin, 37 Mo., 373). That one tried and either convicted or acquitted of arson in the burning of a mill may not be thereafter tried for the burning of the contents of the mill. (State v. Colgate, 31 Kans., 511.)

On the contrary, it has been held the passing of two counterfeit bills at different times, although made from the same plate, constitutes two separate and independent offenses and may be punishable as such. (United States v. Randenbush, 8 Pet. (U. S.), 288.) That under the provisions of section 211 of the Penal Code each particular letter, packet, or other nonmailable matter knowingly
49 deposited in the mails or taken therefrom, constitutes a separate offense. Under the provisions of section 215 of the code each separate letter or other writing mailed or taken from the mails in aid of a scheme to defraud, constitutes a separate offense. Under statutes prohibiting the sale of intoxicating liquors, each sale so made constitutes separate offenses, &c.

Mr. Bishop, in his work on Criminal Law, 7th ed., sec. 1051, lays down certain rules deduced from the very reason of the matter for the determination of the question here presented, as follows:

"Looking further to see when the offences are the same, we have, in reason, the following propositions: They are not the same, first, when the two indictments are so diverse as to preclude the same evidence from sustaining both; or, secondly, when the evidence offered on the first indictment, and that intended to be offered on the second, relate to different transactions, whatever be the words of the respective allegations; or, thirdly, when each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction—a proposition of which the exact limits are difficult to define; or, fourthly, when some technical variance precludes a conviction on the first indictment, but permits it on the second. Yet, fifthly, the offences are the same in all other circumstances wherein the evidence to support one of the indictments sustains also the other; and, sixthly, if the two indictments set out offences which are alike and relate to one transaction, yet, if one contains more of criminal charge than the other, but upon it there could

be a conviction for what is embraced in the other, the offences, though of differing names, are, within the constitutional protection from a second jeopardy, the same."

Applying the foregoing rules to the case at bar, it is evident from a reading of the several counts of the indictment to which petitioner pleaded guilty, and under which he stands committed, all the registered mail pouches cut into by him were located in the same railway postal car, and as all are charged to have been by him cut into on the same day, at the same place, and in the same postal car, it is fair to assume the separate acts of cutting into the pouches done by him followed each other in such rapid succession as the exigencies of the operation would admit. Again, each separate act of cutting into said pouches was actuated by the same general character of criminal intent, viz, to steal the contents of the sacks cut into.
49 Hence, the entire operation of petitioner in the transaction will be assumed to have been continuous in point of time. However, within the true intent and meaning of the foregoing rules and the many adjudicated cases, this continuous operation or transaction of petitioner in reason must be regarded as constituting more than one offending against the statute involved in this controversy, and for the following reasons: (1) In order to prove the guilt of petitioner in cutting into registered-mail pouch lock No. X 9661, rotary No. 441, as described and charged in count two of the indictment, with the intent of stealing the contents thereof, it was neither incumbent upon nor necessary for the Government in any way or manner to refer to the existence, location, or description of registered pouch, lock No. 11779, rotary No. 252, described in the third count in the indictment, or to make any reference to the numbering of the locks or other description of any other registered pouch described in any succeeding count of the indictment; (2) while the nature of the intent in the mind of petitioner at the time each successive registered pouch was by him cut into was similar in kind, it was not identical, for at each successive act of cutting into a pouch it was incumbent upon the Government to prove (if not as in this case admitted) the intent of petitioner to steal the contents of such particular registered pouch was present in his mind; (3) had the Government failed to prove petitioner cut into any pouch as particularly described and numbered in any count of the indictment with the intent to steal the mail from such pouch, while such failure of proof would have had no effect whatever upon the question of the guilt or innocence of petitioner under any other count of the indictment, he could not, without such proof, have been convicted of the particular offense specifically described in such count; (4) while the act of petitioner in cutting into the several separate, independent, distinct, and particularly described registered pouches, as are
50 charged in the separate counts of the indictment, was not, as a matter of course, a burglarious act, yet, the act of cutting, tearing, or other like injuring done for the purpose of entering into

such pouch to steal the contents thereof prohibited by the statute in question is quite nearly related in its nature to the act of burglarizing a building; and while, as has been seen, it has been held the acts of breaking into a building with the intent to commit therein larceny, and the actual commission thereafter of the intended larceny constitutes but one punishable offense, either the burglary or the larceny committed, as the prosecution may elect, yet, in the very reason of things it can not be held the successive breaking into of many separate buildings by the same person, with the intent to commit larceny therein, does not constitute more than one offense of burglary, no matter how quickly in point of time the one act of breaking may follow the other, or that the entire transaction may be regarded as one continuous criminal enterprise, for the doing of which but one punishment could be imposed on the wrongdoer.

Mr. Chief Justice Waite, delivering the opinion of the court In re Henry, 123 U. S. 373, said:

"As was well said by the district judge on the trial of the indictment, 'the act forbids, not the general use of the post office for the purposes of carrying out a fraudulent scheme or device, but the putting in the post office of a letter or packet, or the taking out of letter or packet, from the post office in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act.' It is not, as in the case of In re Snow, 120 U. S. 274, a continuous offence, but it consists of a single isolated act, and is repeated as often as the act is repeated."

In principle I think the present case is controlled by the rule there announced, that each act of petitioner in cutting into each several registered pouch was a single, isolated, punishable act, repeated as often as the act was repeated.

51 It follows, as by the very terms of the statute in question, the law-making power evidently attempted to and did make criminal the isolated act of cutting into each one of the particularly described registered-mail pouches, as set forth in the indictment on which petitioner was tried and convicted, as such cuttings were done with the prohibited intent, the several counts of the indictment to which he pleaded guilty constitute not a single offense but separate punishable offenses.

In consequence, the judgment imposed, under which the petitioner stands committed, was within the jurisdiction of the court and the writ must be denied.

It is so ordered.

JOHN C. POLLOCK, *Judge.*

KANSAS CITY, KANSAS, *February 13th, 1914.*

(Endorsed:) No. 1504. In re George Ebeling, ex parte. Memo. of decision. Filed Feb. 13, 1914. Morton Albaugh, clerk.

52 In the District Court of the United States within and for the First Division of the District of Kansas. In the matter of the application of George Ebeling, ex parte. No. 1504.

Order denying a writ of habeas corpus.

Now, on this 13th day of February, A. D. 1914, same being one of the regular court days of the January term, 1914, this cause comes on for final hearing and determination, upon the verified application for a writ of habeas corpus, waiver of production of the petitioner's body, order to show cause, return of Thomas W. Morgan, warden of the United States penitentiary, and petitioner's motion for judgment notwithstanding the return thereto, said cause having previously, on the 12th day of January, 1914, been argued and submitted on briefs, Frans E. Lindquist, attorney for the petitioner, and Martin J. Ostergard, H. D. Kissenger, and Leonard Waddell, of counsel, appearing in support of such application, and Fred Robertson, United States attorney, and L. S. Harvey, his assistant appearing in opposition thereto, and the court, after hearing the arguments of counsel, and having duly considered the briefs filed, and being fully advised in the premises, doth find the issues against the petitioner, and that he is not entitled to a writ of habeas corpus:

It is ordered, adjudged, and decreed by the court, that petitioner's application be, and the same is hereby denied; that the petitioner be remanded to the custody of said warden, and that the costs of this proceeding be taxed against said George Ebeling.

To which action, findings, and judgment of the court, the said George Ebeling, by his said attorney, Frans E. Linquist, duly excepts, and prays that such exceptions may be noted.

JOHN C. POLLOCK, *Judge.*

53 (Endorsed:) No. 1504. In the matter of the application of George Ebeling ex parte. Order denying a writ of habeas corpus. Filed Feb. 13, 1914. Morton Albaugh, Clerk. Frans E. Lindquist, attorney for petitioner.

54 In the District Court of the United States within and for the First Division of the District of Kansas. In the matter of the application of George Ebeling, ex parte. No. 1504.

Application for an appeal.

The above-named George Ebeling, conceiving himself aggreived by the order entered on the 13th day of February, 1914, in the above-entitled proceeding, denying the application for a writ of habeas corpus, doth hereby appeal to the Supreme Court of the United States of America.

Your petitioner further prays that he may be allowed to prosecute such appeal as a poor person, as per his poverty affidavit here-

unto annexed, marked Exhibit A and made a part of this application.

Your petitioner further prays that such appeal may be allowed; that a transcript of the record and proceedings, and papers upon which such order was made, duly authenticated, may be sent to the Supreme Court of the United States of America.

FRANS E. LINDQUIST,
Attorney for Appellant.

55 EXHIBIT A.

In the District Court of the United States within and for the First Division of the District of Kansas. In the matter of George Ebeling, ex parte. No. 1504.

Poverty affidavit.

UNITED STATES OF AMERICA,
State of Kansas, county of Wyandotte, ss:

George Ebeling, being first duly sworn, says that he desires to perfect an appeal from the decision of this court, rendered February 13th, 1914, to the Supreme Court of the United States; that because of his poverty he is unable to pay the costs of such appeal or give security for the same; that affiant verily believes that he is entitled to the redress he seeks by such appeal; that the only consideration which Frans E. Lindquist has received for his services is the sum of twenty & no/100 ($20.00) dollars, out of which amount he has paid all accrued costs to date; and the affiant verily believes that he is entitled to his discharge in habeas corpus.

GEORGE EBELING.

Subscribed and sworn to before me, this 21st day of May, 1914.

[SEAL.] THOS. C. TAYLOR, *Notary Public.*

My commission expires Jan. 13, 1915.

(Endorsed:) No. 1504. In the District Court of the United States within and for the First Division of the District of Kansas. In the matter of the application of George Ebeling, ex parte. Application for an appeal. Poverty affidavit. Filed June 18, 1914. Morton Albaugh, clerk. Frans E. Lindquist, attorney for appellant. Kansas City, Missouri.

56 In the District Court of the United States within and for the First Division of the District of Kansas. In the matter of the application of George Ebeling, ex parte. No. 1504.

Order allowing appellant to prosecute the appeal as a poor person.

Now, on this 18th day of June, A. D. 1914, this cause comes on for further consideration, upon the application for an appeal, and the

poverty affidavit of said George Ebeling thereunto annexed, and Frans E. Lindquist, attorney for said appellant, appearing in support of such application to prosecute such appeal heretofore granted as a poor person.

It is ordered by the court that said George Ebeling be, and he is hereby, allowed to prosecute such appeal to the Supreme Court of the United States of America, without being required to prepay fees or costs, as required by act of June 25, 1910.

JOHN C. POLLOCK, *Judge.*

(Endorsed:) No. 1504. Order granting leave to prosecute appeal as a poor person. Filed June 18, 1914. Morton Albaugh, clerk.

57 In the District Court of the United States within and for the First Division of the District of Kansas. In the matter of the application of George Ebeling, ex parte. No. 1504.

Assignment of errors.

And now comes the above-named George Ebeling and makes and files this his assignment of errors, to wit:

First. The United States District Court, at St. Louis, Missouri, had no jurisdiction to impose but one sentence.

Second. All of the second, third, fourth, fifth, sixth, and seventh counts charged but one continuous criminal act.

Third. Sentence on third, fourth, fifth, sixth, and seventh counts are coram non judice and void.

Fourth. Fines and costs a civil liability only.

Fifth. Petitioner now held in involuntary servitude, not as a punishment for any crime against the laws of the United States, or any of its States of Territories, whereof he has been previously duly convicted, in violation of section 1 of Article XIII of amendments to the Constitution of the United States of America.

Sixth. Petitioner now illegally detained, imprisoned, and deprived of his liberty, without due process of law, and is now subjected, for the same offense, to be punished and placed in jeopardy six times, all in violation of Article V of amendments to the Constitution of the United States of America.

Seventh. The United States District Court, at Kansas City, Kansas, erred in denying the petitioner's application for a writ of habeas corpus.

58 Eighth. The United States District Court at Kansas City, Kansas, erred in holding that the cutting, tearing, and injuring of each mail pouch, with intent to feloniously rob, steal, and carry away the contents of such mail pouch, at the same time and place and as part of one continuous criminal act, constitutes six separate offenses for which six separate punishments could be imposed.

Ninth. The United States District Court at Kansas City, Kansas, erred in overruling the petitioner's motion for judgment notwithstanding the return.

Tenth. The petitioner having served the valid portion of such sentence, the judgment and sentence imposed upon the third, fourth, fifth, sixth, and seventh counts of said indictment should be declared null and void, and this cause should be reversed and remanded with direction to issue a writ of habeas corpus.

FRANS E. LINDQUIST,
Attorney for Appellant.

(Endorsed:) No. 1504. In the District court of the United States within and for the first division of the district of Kansas in the matter of the application of George Ebeling, ex parte. Assignment of errors. Filed June 19, 1914. Morton Albaugh, clerk. Frans E. Lindquist, attorney for appellant, Kansas City, Missouri.

59 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Morton Albaugh, clerk of the District Court of the United States for the district of Kansas, do hereby certify the within and foregoing to be true, full, and correct copies of the record and proceedings in said court in case No. 1504, in the matter of the application of George Ebeling for writ of habeas corpus.

I further certify that the original citation is attached hereto and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 11th day of August, A. D. 1914.

[SEAL.] MORTON ALBAUGH, *Clerk.*

(Endorsement on cover:) File No. 24480, Kansas D. C. U. S. Term No. 736. George Ebeling, appellant, *vs.* Thomas W. Morgan, warden of the United States penitentiary at Leavenworth, Kansas. Filed December 21st, 1914. File No. 24480.

O

No. .....

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

GEORGE EBELING, APPELLANT,

VS.

THOMAS W. MORGAN, WARDEN OF THE UNITED STATES PENITENTIARY, APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF KANSAS.
HONORABLE JOHN C. POLLOCK, JUDGE.

APPLICATION TO PROSECUTE APPEAL AS A POOR PERSON.

Comes now the above named appellant, by his attorney, Frans E. Lindquist, Esq., a duly admitted, licensed and practicing attorney and counselor of this Honorable Court, and respectfully represents and shows to this Honorable Court:

That heretofore, on or about the 26th day of December, A. D. 1913, the said George Ebeling caused to be filed in the office of the clerk of the District Court of the United States within and for the First Division of the District of Kansas, a certain application for a writ of *habeas corpus*, and thereupon procured from the Honorable John C. Pollock, Judge of said court, a certain order, directed to Thomas W. Morgan, Esq., Warden of the United States Penitentiary, at Leavenworth, within said Division and District of Kansas, to show cause before said District Court, at Kansas City, Kansas, on the 12th day of January, 1914, why a writ of *habeas corpus* should not issue for the release of said George Ebeling from said United States Penitentiary.

That thereafter, on said 12th day of January, 1914, the said Thomas W. Morgan, Warden, made his return, traversing none of the allegations of fact contained in said application for a writ of *habeas corpus*, and to which return the said George Ebeling filed a motion for judgment notwithstanding such return.

That thereafter, on said 12th day of January, 1914, said cause was argued orally, and submitted on briefs.

That thereafter, on the 13th day of February, 1914, the said District Court entered an order denying such application and refusing to issue a writ of *habeas corpus* as prayed for.

That thereafter, on or about the 18th day of June, 1914, upon proper application, the said District Court

granted said George Ebeling an appeal to this Honorable Court, and permitted the said George Ebeling to prosecute such appeal as a poor person, and that the said district judge issued a citation, directed to said warden, returnable as required by law, which said citation was duly served and filed in said District Court.

That your petitioner has no money or property with which to pay the costs and expenses of prosecuting such appeal, and for the filing fee in this Honorable Court, and that the only compensation which he has paid his said attorney, for his services in said District Court, and in perfecting an appeal to this Honorable Court, is the sum of twenty and no/100 ($20.00) dollars, out of which he has paid for a certified copy of the proceedings in the United States District Court, at St. Louis, Missouri, where said George Ebeling was tried and convicted, and the filing fee in said United States District Court of Kansas.

That your petitioner verily believes that he has a just and meritorious case, and that said judgment of the District Court of Kansas should be reversed and remanded with directions to issue such writ of *habeas corpus,* and that unless he be allowed to prosecute such appeal as a poor person, he will be wholly deprived of his right to have such judgment reviewed in this Honorable Court, and of his constitutional right to be released from such illegal imprisonment.

Wherefore, the petitioner prays that he may be allowed to prosecute such appeal as a poor person, as provided by an Act of Congress, approved June 25th, 1910, and your petitioner will ever pray, etc.

FRANS E. LINDQUIST,
Attorney for Appellant.

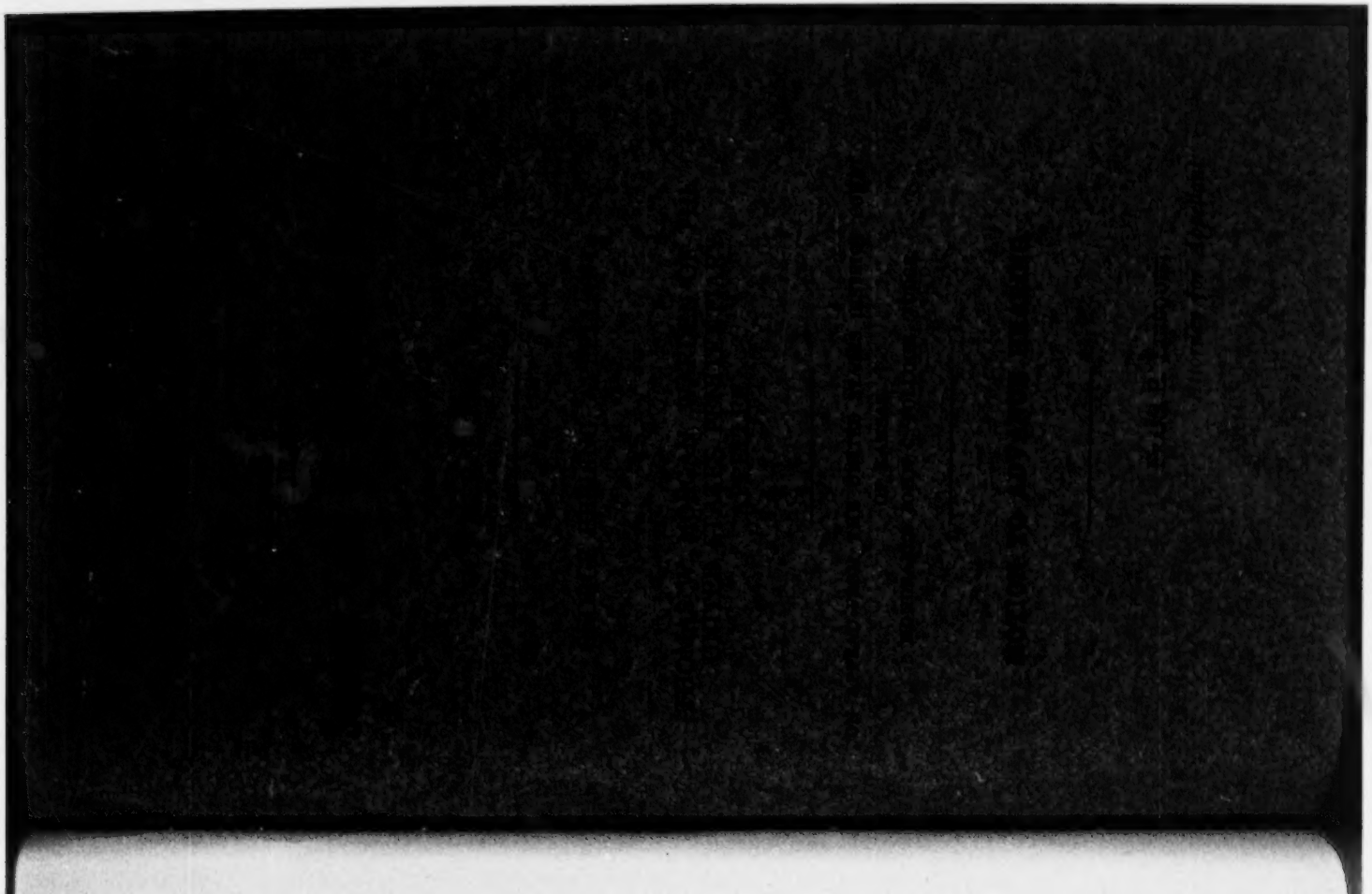
United States of America, State of Kansas, County of Leavenworth, ss.

George Ebeling, being first duly sworn says, that the statements of fact contained in the above and foregoing application are true.

George Ebeling.

Subscribed and sworn to before me, this 5th day of October, 1914. My commission expires January 13, 1915.

Thos. C. Taylor,
(Seal) Notary Public, Leavenworth County, Kansas.



No. .....

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

GEORGE EBELING, APPELLANT,

VS.

THOMAS W. MORGAN, WARDEN OF THE UNITED STATES PENITENTIARY, APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF KANSAS.
HONORABLE JOHN C. POLLOCK, JUDGE.

MOTION TO ADVANCE HEARING.

Comes now the above named appellant, by his attorney, Frans E. Lindquist, Esq., a duly admitted, licensed and practicing attorney and counselor of this Honorable Court, and moves this Honorable Court to advance this cause for hearing and determination in

order that speedy justice might be done said appellant, for the reasons following, to-wit:

First. Because heretofore, on the 20th day of May, 1910, the appellant entered a plea of guilty, as charged in the second, third, fourth, fifth, sixth and seventh counts of an indictment then and there pending in the District Court of the United States, at St. Louis, Missouri, and was sentenced by the Honorable David P. Dyer, Judge, to pay a fine of $500 and the costs of the prosecution, and to be confined and imprisoned in the United States Penitentiary, at Leavenworth, Kansas, for a period of three years, so far as the same relates to the second count of said indictment, and further that he pay a fine of $500, and be confined and imprisoned in said penitentiary for a period of three years, upon each of the third, fourth, fifth, sixth and seventh counts of said indictment, to run consecutively with the sentence imposed under the second count of said indictment, but that the sentence as to the imprisonment on the seventh count should begin, run and terminate concurrently with the sentence imposed under the second, third, fourth, fifth and sixth counts of said indictment, making in all a period of fifteen years.

Second. Because the second, third, fourth, fifth, sixth and seventh counts of said indictment, and each of them charge that on the 21st day of January, 1910, at or near Glencoe, in St. Louis County, Missouri, the appellant (and one William W. Lowe) did tear, cut and

injure six separate and distinct mail pouches, containing mail of the United States, while contained in a United Railway Postal Car on Train No. 8 of the St. Louis and Kansas City Railway Postoffice, on the line of the Missouri Pacific Railway, in transit between Kansas City, Missouri, and St. Louis, Missouri, with the intent, then and there, to forcibly, knowingly and feloniously rob, steal and carry away the contents of said mail pouches, in violation of Section 189 of the Criminal Code of the United States, but that all of such six counts charge but one continuous criminal act.

Third. Because the Honorable David P. Dyer, Judge, had no jurisdiction to impose but one sentence of a fine of not to exceed $500, or imprisonment not to exceed three years, or both, upon your appellant, and that the sentence imposed on the third, fourth, fifth, sixth and seventh counts are *coram non judice* and void.

Fourth. Because said appellant arrived at said penitentiary, on the 21st day of May, 1910, in execution of such sentence, imposed under the second count of said indictment, and has ever since continued to remain there, in execution of such judgment and sentence aforesaid, and has served the valid portion of such sentence.

Fifth. Because said appellant is now held in involuntary servitude, not as a punishment for any crime against the laws of the United States, or any of its states or territories, whereof he has been previously duly convicted, in violation of Section 1 of Article XIII of

Amendments to the Constitution of the United States of America.

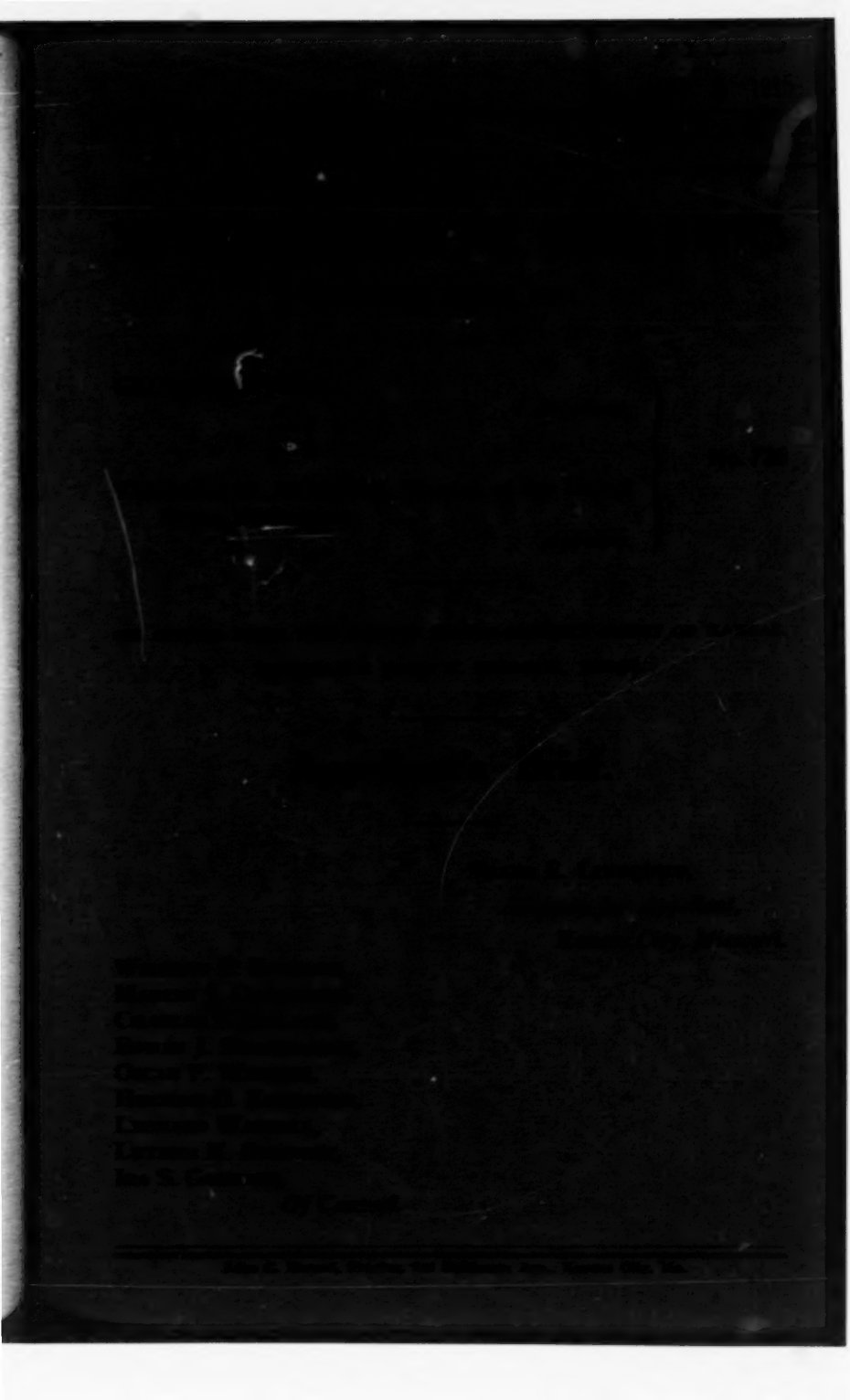
Sixth. Because said appellant is now illegally detained, imprisoned and deprived of his liberty, without due process of law, and is now subjected, for the same offense, to be punished and placed in jeopardy six times, all in violation of Article V of Amendments to the Constitution of the United States of America.

Seventh. Because the District Court of the United States of Kansas, erred in denying the appellant's application for a writ of *habeas corpus* and in overruling the appellant's motion for judgment notwithstanding the return.

Eighth. Because the appellant is unable to furnish a superseadeas bond, for the purpose of being released from said pentientiary, pending the hearing and determination of this cause, and that unless he be released, by order of this Honorable Court, he will be compelled to serve all of such sentences, to his irreparable loss and injury.

Ninth. Because said cause should be reversed and remanded, with directions to the United States District Court of Kansas, to award the appellant a writ of *habeas corpus*.

FRANS E. LINDQUIST,
Attorney for Appellant.



INDEX.

Page

Statement of the case 1

Assignment of Errors 4–5

POINT No. 1—*No jurisdiction to impose but one sentence*.. 6–13

Sec. 189 of the Criminal Code 6

Second count of the indictment 6–7

Crepps v. *Durden*, Cowper, 640 8–9

In re Snow, 120 U. S., 283 10

In re Nielsen, 131 U. S., 176 10–11

Halligan v. *Wayne*, 179 Fed., 112 11–12

Munson v. *McClaughry*, 198 Fed., 72 12

Stevens v. *McClaughry*, 207 Fed., 18 12

O'Brien v. *McClaughry*, 209 Fed., 816 12

POINT II—*The six counts charge but one offense* 13–16

Commonwealth v. *Prescott et al.*, 153 Mass., 396 13

Hurst v. *The State*, 86 Ala., 640 13–14

People v. *Stephens*, 79 Cal., 428 14

State v. *Larson*, 85 Iowa, 659 14

Storrs v. *The State*, 3 Mo., 9 14

Lorton v. *The State*, 7 Mo., 55 14–15

The State v. *Daniels*, 32 Mo., 558 15

The State v. *Wagner*, 118 Mo., 626 15

The State v. *O'Connell*, 144 Mo., 393 15

The State v. *Maggard*, 160 Mo., 469 15

The State v. *Soper*, 207 Mo., 502 15

State v. *Egglesht*, 41 Iowa, 574 15–16

The People v. *Van Kuren*, 5 Parker, C. R. 66 16

State v. *Benham*, 7 Conn., 414 16

Furnace v. *The State*, 153 Ind., 93 16

INDEX—CONTINUED.

Page

State v. *Colgate*, 31 Kansas, 511 16
Nichols v. *The Commonwealth*, 78 Mass., 180 16
Wilson v. *The State*, 45 Tex. Rep., 76 16
State v. *Williams*, 10 Hump., 101 16
State v. *Moore*, 86 Minn., 422 16
The People ex rel. Tweed v. *Liscomb, Warden*, 60 N. Y., 559 16
The People v. *Stephens*, 79 Cal., 428 16
Fischer v. *Commonwealth*, 1 Bush, 211 16
State v. *Larson*, 85 Iowa, 659 16
Vining v. *State*, 146 S. W., 909 16
State v. *Sampson*, 138 N. W., 473 16
Commonwealth v. *Prescott*, 153 Mass., 396 16
Hurst v. *State*, 86 Ala., 604 16

POINT III—*Sentences on five counts are void* 17–18
United States v. *Pridgeon*, 153 U. S., l. c. 62 17

POINT IV—*Fines and costs civil liability only* 18–19
Sec. 1041, U. S. Comp Stat., 1901 18
Ex parte Jackson, 96 U. S., 727 18

POINT V—*Involuntary servitude* 19–21

Sec. 1 of Art. XIII of Amendments to the Constitution of the United States 19
Ex parte Peters, 12 Fed., 461, and 4 Dill., 169 19–20
Munson v. *McClaughry, Warden, supra* 20
United States v. *Petit*, 114 U. S., l. c. 429 20-21

POINT VI—*Six times in jeopardy, due process of law* 21

Page

POINT VII—*Judge Pollock erred in denying application*..21–30

Sec. 189 of the Code of Criminal Procedure 22
Ex parte Jackson, 96 U. S., 727 22
In re Snow, 120 U. S., 274 23
Hans Neilson, Petitioner, 131 U. S., 176 23
Halligan v. *Wayne*, 179 Fed., 112 23
Munson v. *McClaughry*, 198 Fed., 72 23
Stevens v. *McClaughry*, 207 Fed., 18 23
Munson v. *McClaughry, supra* 24
Stevens v. *McClaughry, supra* 24
State v. *Damon*, 2 Tyler, 387 24
Clem v. *The State*, 42 Ind., 420 24
Ben v. *The State*, 22 Ala., 9 24
Creppe v. *Durden*, Cowper, 640 25
Nichols v. *Commonwealth*, 78 Mass., 180 25
Wilson v. *State*, 45 Texas, 76 25
State v. *Williams*, 10 Humph., (Tenn.) 101 25
Lorton v. *The State*, 7 Mo., 55 25
State v. *Morphin*, 37 Mo., 373 25
State v. *Colgate*, 31 Kan., 511 25
United States v. *Randenbush*, 8 Pet., (U. S., 288) 25
Mr. Bishop on Criminal Law, 7th Ed., sec. 1051 25–26
In re Henry, 123 U. S., 373 27
In re Snow, 120 U. S., 274 28
In re Henry, 123 U. S., 372 29
Sec. 5480, R. S. 30

POINT VIII—*Judge Pollock's contention is erroneous.* 30–31
Crepps v. *Durden, supra* 31

Page

POINT IX—*Motion for judgment should have been sustained* 31–32

POINT X—*Served valid portion of sentence* 32
Craemer v. *Washington State,* 168 U. S., 124..... 32
Dimmick v. *Tompkins,* 194 U. S., 546 32

Argument 33–38

Sec. 189, Criminal Code of the United States 33
Sec. 4548, Revised Statutes of Missouri, 1909 33
In re Snow, 120 U. S., l. c. 283-4 35
In re Nielson 35
Munson v. *McClaughry, Warden,* 198 Fed., 72 35
Stevens v. *McClaughry, Warden,* 207 Fed., 18 36
O'Brien v. *McClaughry, Warden,* 209 Fed., 816 36
Hurst v. *The State,* 86 Ala., 640 36
United States v. *Pridgeon,* 153 U. S., l. c. 62 36–37
Ex parte Lange, 18 Wall., 163 37
Ex parte Creasy, 243 Mo., 707 37

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

GEORGE EBELING,
Appellant,

v.

THOMAS W. MORGAN, Warden of the United States Penitentiary,
Appellee.

No. 736

ON APPEAL FROM THE UNITED STATES DISTRICT COURT OF KANSAS.

HONORABLE JOHN C. POLLOCK, JUDGE.

Appellant's Brief.

STATEMENT OF THE CASE.

On April 28, 1910, the Grand Jurors of the United States, returned into the United States District Court, at St. Louis, Missouri, a certain indictment, in seven counts, against the appellant

and one William W. Lowe, said cause being known as "United States v. William W. Lowe and George Ebeling, Defendants, No. 5475."

The first count of said indictment charges train robbery, at or near Glencoe, in St. Louis County, Missouri, on the 21st day of January, 1910, in violation of Section 197 of the Criminal Code of the United States. A *nolle prosequi* was entered by the District Attorney, as to the appellant.

The second, third, fourth, fifth, sixth and seventh counts of said indictment charge, that on said 21st day of January, 1910, at or near Glencoe, in St. Louis County, Missouri, the said William W. Lowe and George Ebeling wilfully, knowingly and feloniously did tear, cut and injure six separate and distinct mail pouches, containing mail of the United States, while contained in a United States Railway Postal Car on train No. 8 of the Ct. Louis and Kansas City Railway Post Office, on the line of the Missouri Pacific Railway, in transit between Kansas City, Missouri and St. Louis, Missouri, with the intent, then and there, to forcibly, knowingly and feloniously rob, steal and carry away the contents of said mail pouches, in violation of Section 189 of said Criminal Code.

May 20, 1910, Mr. Ebeling entered a plea of guilty, and was sentenced by the Honorable DAVID P. DYER, District Judge to pay a fine of $500 and the costs of the prosecution, and to be confined and imprisoned in the United States Penitentiary, at Leavenworth, Kansas, for a period of three years, so far as the same relates to the second count of said indictment, and further that your petitioner pay a fine of $500, and to be confined and imprisoned in said penitentiary for a period of three years, upon each of the third, fourth, fifth, sixth and seventh counts of said indictment, to run consecutively with the sentence imposed under the second count of said indictment, but that the sentence as to the imprisonment on the seventh count should begin, run and terminate concurrently with the sentence imposed under the second, third, fourth, fifth

and sixth counts of said indictment, making in all a period of fifteen years.

May 21, 1910, Mr. Ebeling arrived at the United States Penitentiary, at Leavenworth, to commence serving such sentence aforesaid.

December 26th, 1913, after having served out the sentence imposed under the said second count, Mr. Ebeling presented to the Honorable John C. Pollock, District Judge, his application for a Writ of Habeas Corpus, and procured from said judge an order to show cause, directed to Thomas W. Morgan, Esq., Warden of said penitentiary, returnable before the District Court of the United States within and for the First Division of the District of Kansas, at Kansas City, Kansas, on the 12th day of January, 1914.

January 12, 1914, Thomas W. Morgan, Warden, filed his return, traversing none of the allegations of fact contained in said application, to which return Mr. Ebeling filed his motion for judgment notwithstanding the return. The cause was thereupon argued orally, submitted on briefs and taken under advisement.

January 13th, 1914, the said United States District Court of Kansas, entered an Order denying said application and a Writ of Habeas Corpus, and refused to issue such Writ, to which action and ruling of the court, the appellant duly excepted.

Within six months thereafter, the appellant perfected an appeal to this Honorable Court, and was allowed to prosecute such appeal as a poor person. A citation was duly issued and served upon said respondent. The clerk of said district court sent a transcript of such proceedings to the clerk of this court. Said transcript was filed in the office of the clerk of this court, December 21, 1914.

January 5th, 1915. Upon proper application, this court sustained the appellant's motion to prosecute appeal as a poor person.

February 1st, 1915, this court sustained the appellant's motion to advance hearing, and set said cause down for argument, on the fifth day of April, 1915.

The Assignment of Errors filed in said district court, omitting caption and signature of counsel, are as follows, to-wit:

ASSIGNMENT OF ERRORS.

And now comes the above named George Ebeling and makes and files this his Assignment of Errors, to-wit:

First. The United States District Court, at St. Louis, Missouri, had no jurisdiction to impose but one sentence.

Second. All of the second, third, fourth, fifth, sixth and seventh counts charge but one continuous criminal act.

Third. Sentence on third, fourth, fifth, sixth and seventh counts are *coram non judice* and void.

Fourth. Fines and costs a civil liability only.

Fifth. Petitioner now held in involuntary servitude, not as a punishment for any crime against the laws of the United States, or any of its states or territories, whereof he has been previously duly convicted, in violation of Section 1 of Article XIII of Amendments to the Constitution of the United States of America.

Sixth. Petitioner now illegally detained, imprisoned and deprived of his liberty, without due process of law, and is now subjected, for the same offense, to be punished and placed in jeopardy six times, all in violation of Article V, of Amendments to the Constitution of the United States of America.

Seventh. The United States District Court, at Kansas City, Kansas, erred in denying the petitioner's Application for a Writ of Habeas Corpus.

Eighth. The United States District Court, at Kansas City, Kansas, erred in holding that the cutting, tearing and injuring of each mail pouch, with intent to feloniously rob, steal and carry away the contents of such mail pouch, at the same time and place and as part of one continuous criminal act, constitutes six separate offenses for which six separate punishments could be imposed.

Ninth. The United States District Court, at Kansas City, Kansas, erred in overruling the petitioner's motion for judgment notwithstanding the return.

Tenth. The petitioner having served the valid portion of such sentence, the judgment and sentence imposed upon the third, fourth, fifth, sixth and seventh counts of said indictment should be declared null and void, and this cause should be reversed and remanded with direction to issue a Writ of Habeas Corpus.

BRIEF OF ARGUMENT.

I.

No jurisdiction to impose but one sentence.

Section 189 of the Criminal Code of the United States provides:

"INJURING MAIL BAGS, ETC., PUNISHMENT FOR. SEC. 189. Whoever shall tear, cut or otherwise injure any mail bag, pouch, or other thing used or designated for use in the conveyance of the mail, or shall draw or break any staple or loosen any part of any lock, chain or strap attached thereto, with intent to rob or steal any mail, or to render the same insecure, shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both."

The second count of said indictment, charging a violation of said section, is as follows, (Transcript of record, 9-10):

"*Second Count.* And the Grand Jurors aforesaid, on the oath aforesaid, do further present: That William W. Lowe and George Ebeling, heretofore, to-wit: On the 21st day of January, 1910, at or near Glencoe, in the County of St. Louis, State of Missouri, within the Division and District aforesaid, and within the jurisdiction of this court aforesaid, wilfully, knowingly and feloniously did tear, cut and injure a certain mail pouch then and there used and designed for use in the conveyance of mails of the United States, to-wit: Mail pouch known as through registered pouch, made of canvas, with lock No. X9661, and rotary No. 441, attached thereto, said mail pouch containing certain mail of the United States and being then and there in transit between Kansas City, Missouri and St. Louis, Missouri; with the intent then and there, on the part of said William W. Lowe and George

Ebeling to forcibly, knowingly and feloniously rob, steal and carry away the contents of said mail pouch, so as aforesaid; Contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the United States."

The third, fourth, fifth, sixth and seventh counts, and each of them, in the same language, at the same time and place, charge the cutting, tearing and injuring of five other specific mail pouches. Upon a plea of guilty, Judge Dyer imposed a fine of $500 and costs and imprisonment for a period of three years, upon each of such six counts, to run consecutively, except that the sentence imposed under the seventh count should begin, run and terminate concurrently with the sentence imposed on the second, third, fourth, fifth and sixth counts of said indictment, making a total of fifteen years. (Transcript of record, 17-20).

Said section 189 is levied against the robbing or stealing of any mail, either (1) by the tearing, cutting or otherwise injuring any mail bag, pouch or other thing used or designated for use in the conveyance of the mails, or (2) by drawing or breaking any staple or by loosening any lock, chain or strap attached thereto, with intent to rob or steal any mail, or to render the same insecure. Each count of said indictment is based upon the first mentioned violation of said section.

We respectfully submit that the offense consists in doing anything in violation of this section, not the extent of it. Mr. Ebeling may have injured one or a dozen mail pouches. The offense would be the same. The word "any" emphasizes the fact, intensifies it and makes it clear that the mail shall not be tampered with at all, not that each motion of the hand of the defendant shall constitute a separate criminal offense. The punishment is for the entire offense, not for each step taken in the commission thereof. In aggrevated cases, the court might properly impose the maximum punishment, but only once. In the case at bar, Judge Dyer imposed

six separate punishments. The maximum punishment was imposed six times. That is unauthorized. The court had no jurisdiction to impose more than one sentence. The sentence under the third, fourth, fifth, sixth and seventh counts of said indictment, are *coram non judice.*

A leading case on the subject in England, is *Crepps* v. *Durden,* Cowper, 640. In that case the Statute, 29 Car. c., 7 provided "that no tradesman or other personal shall exercise any worldly labor, business, or work of their ordinary calling on the Lord's day, work of necessity and charity only excepted." A penalty of five shillings was affixed to each offense, and it was cognizable before a justice of the peace. Crepps, a baker, was convicted before Durden, a justice, by four separate convictions, "of selling small hot loaves of bread, the same not being any work of charity, on the same day, being Sunday," in violation of the statute. Durden issued *four warrants, one on each* conviction, to officers, who, under them, levied *four penalties* of five shillings each, on the goods of Crepps. The latter sued Durden and the others, in trespass, in the King's Bench, in 1777, and had a verdict before Lord Mansfield, for three sums of five shillings each, subject to the opinion of the court.

At a subsequent day, the unanimous opinion of the court was delivered by Lord Mansfield. His first consideration was whether the legality of the convictions could be objected to before they were quashed. As to this he said:

> "Here are three convictions of a baker, he having been before convicted for exercising his ordinary calling on that identical day. If the Act of Parliament gives authority to levy but one penalty, there is an end to the question, for there is no penalty at common law. On the construction of the Act of Parliament the offense is " exercising his ordinary trade upon the Lord's day", and that without any fractions of a day, hours or minutes. It is but one entire offense, whether longer or shorter in point of duration; so, whether it consists

of one, or a number of particular acts. The penalty incurred for this offense is five shillings. There is no idea conveyed by the act itself, that if a tailor sews on the Lord's day, every stitch he takes is a separate offense; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that these are so many separate and distinct offenses. There can be but one entire offense on the same day. Killing a single hare is an offense, but the killing of ten more on the same day will not multiply the offense, or the penalty imposed by the statute for killing one. Here repeated offenses are not the object which the Legislature had in view in making the Statute; but singly, to punish a man for exercising his ordinary trade or calling on a Sunday. Upon this construction, the justice had no jurisdiction whatever in respect of the three last convictions."

This case is quoted with approval *In re Snow*, 120 U. S., l. c. 283-4. This decision was handed down in 1777, and we have failed to find that any court has ever questioned the correctness of that rule.

In re Snow, 120 U. S., 275, Mr. Snow was convicted separately, in the District Court of the territory of Utah, of three indictments. The indictments were based on section 3 of an Act of March 22, 1882, which prohibits any male person from cohabiting with more than one woman. Indictment No. 741 charged that on the 1st day of January, 1883 and on divers others days and times thereafter, and continuously between said 1st day of January, 1883, and the 31st day of December, 1883, Mr. Snow did then and there unlawfully live and cohabit with more than one woman, to-wit: with Adeline Snow, Sarah Snow, Eleanor Snow, Mary H. Snow, Phoebe W. Snow, and Minnie Jensen Snow, and during all of the period aforesaid, did unlawfully claim, live and cohabit with all of said women as his wives.

Indictment No. 743, in the same language, covered a period from and including January 1st, 1884, to December 31st, 1884.

Indictment No. 742, in the same language, covered a period from and including January 1st, 1885, to December 1st, 1885.

Mr. Snow was convicted on each indictment, and sentenced on No. 741, to pay a fine of $300, and to be imprisoned for six months; on No. 742, to pay a fine of $300, and to be imprisoned for six months, after the expiration of sentence on No. 741, and on No. 743, to pay a fine of $300, to be imprisoned for six months, after the expiration of the sentence on No. 742.

After having served the first sentence under No. 741, and paid the first fine of $300, Mr. Snow applied to the District Court for a Writ of Habeas Corpus, which application was denied. He thereupon appealed to this court. Mr. Justice Blatchford, after quoting with approval the case of *Crepps* v. *Durden*, *supra*, said:

> "In the case at bar the statute provides, that if any male person shall thereafter cohabit with more than one woman, he shall on conviction be punished thus and so. The judgment in the case, taken in connection with the other proceedings in the record and the statute, shows, within the principal of *Crepps* v. *Durden*, that there was but one entire offence, whether longer or shorter in point of duration, between the earliest day laid down in any indictment and the latest day laid in any. There can be but one offense between such earliest day and the end of the continuous time embraced by all of the indictments. Not only had the court which tried them no jurisdiction in respect to more than one of the convictions, but as the want of jurisdiction appears on the face of the judgment, the objection may be taken as habeas corpus, when the sentence on more than one of the convictions is sought to be enforced."

In the case of *Neilsen, Petitioner*, 131 U. S., 176, we have another case along the same line. On September 27, 1888, two indictments were found against Mr. Nielsen. The first indictment charged that on the 15th day of October, 1885, and continuously from said time until the 13th day of May, 1888, he did unlawfully

claim, live and cohabit with more than one woman as his wives, to-wit: with Anna Lavinia Nielsen and Caroline Nielsen. On September 29, 1888, he pleaded guilty and was sentenced to imprisonment for three months and to pay a fine of $100 and costs. This sentence was fully complied with.

The second indictment charge that said Nielsen, on the 14th day of May, 1888, did unlawfully commit adultery with one Caroline Nielsen, he being a married man and having a lawful wife and not being married to said Caroline Nielsen. He pleaded not guilty, claimed that the charge of unlawful cohabitation, though formally made only for the period from October 15, 1885 to May 13, 1888, yet, in law, covered the entire period from October 15, 1885, to the time of the finding of said indictments, September 27, 1888; that the offense charged in both indictments was one and the same offence, and not divisible and that he had suffered the penalty therefor. To this plea the district attorney demurred, which demurrer the court sustained. He was thereupon tried, convicted and sentenced to imprisonment for 125 days. He applied in the district court for a writ of habeas corpus, which application was refused. He thereupon appealed to this court. Mr. Justice Bradley, in reversing and remanding said cause, with directions to issue the writ of habeas corpus, at l. c. 186, said:

> "There was but a single offense committed prior to the indictments were found. * * *
>
> On the same principal there might have been an indictment covering each of the thirty-five months, with imprisonment for seventeen years and a half, and fines amounting to $10,500, or even an indictment covering every week." * * *

In *Halligan, Warden* v. *Wayne*, 179 Fed., 112, the Circuit Court of Appeals of the Ninth Circuit held that one accused of burglary with intent to commit larceny may in a second count of the same indictment be charged with the larceny, and on such

an indictment may be convicted and punished for either offense, but not for both; and where there is a general verdict of guilty he may be sentenced for the burglary only.

In *Munson* v. *McClaughry, Warden,* 198 Fed, 72, the Circuit Court of Appeals of the Eighth Circuit re-affirmed this rule. Presiding Judge Sanborn said:

> "A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into, or breaks into a post office building with intent to commit larceny therein, and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing criminal act. It seems unauthorized, inhumane and unreasonable to divide such single intent and such criminal act into two or more separate offenses, and to inflict separate punishments upon the various steps in the act or transaction, such as one for breaking, or for the attempt to break with the same criminal intent, and another for larceny with the same intent, a third for the entering, a fourth for the taking of stamps, a fifth for the taking of other property, a sixth for carrying it away, all with the same criminal intent. And there is evidently no limit to the number of offenses into which a single criminal intent may be divided, if this rule of division and punishment is once firmly established."

This sound rule was again re-affirmed by said Circuit Court of Appeals, in *Stevens* v. *McClaughry, Warden,* 207 Fed., 18, as follows:

> "Separate offenses which are committed at the same time and are parts of a continuous criminal act, inspired by the same criminal intent which is an essential element of such offense, are susceptible of but one punishment."

This rule was again re-affirmed by said Circuit Court of Appeals in *O'Brien* v. *McClaughry, Warden,* 209 Fed., 816.

We respectfully submit that the district court at St. Louis, Missouri, had no jurisdiction to impose but one sentence, not exceeding a fine of $500, or imprisonment not more than three years, or both, and that the sentence imposed under the third, fourth, fifth, sixth and seventh counts are *coram non judice.*

II.

The six counts charge but one offense.

The second, third, fourth, fifth, sixth and seventh counts of said indictment, and each of them, charge but one continuous criminal offense, that he did tear, cut and injure the six mail pouches with intent to forcibly, knowingly and feloniously rob, steal and carry away the contents of said six mail pouches. All of such counts could have been and should have been, joined in one count.

In *Commonwealth* v. *Prescott et al.,* 153 Mass., 396, the complaint alleged that the defendant did "unlawfully take one thousand smelts."

> "Held, if the fish were taken at one time and place, but one offense was committed, and the number of fish is of no consequence, except for the purpose of determining the penalty to be imposed. As the record before us does not show to the contrary, we must assume that the fish were all taken at the same time and place."

In *Hurst* v. *The State,* 86 Ala., 640, Judge Somerville held:

> "If one should cast a stone into a crowd and wound a dozen men at one blow, is he liable to a dozen indictments?

If he burns a hundred houses, by one act of arson, knowing the probable consequences of his unlawful act, would he be guilty of a hundred crimes? Or, should he blow up a hotel with dynamite, murdering a thousand guests, would he be separately liable for the perpetration of a thousand homicides?"

In *People* v. *Stephens*, 79 Cal., 428, Judge Sharpstein held:

"The state cannot split up one crime and prosecute it in several parts; nor can a defendant be convicted and punished for two distinct crimes growing out of the same identical act."

In *State* v. *Larson*, 85 Iowa, 659, Judge Givens held:

"An indictment charging the larceny of thirty-two bushels of flaxseed, in sacks, the property of one L., and forty-eight bushels of flaxseed, in sacks, the property of one P., is not objectionable upon the ground of duplicity."

See also *Crepps* v. *Durden* and cases cited under point 1.

The offense was committed in Missouri, and Mr. Ebeling was tried in Missouri. The supreme court of that state has established a sound rule, which should be adopted by this court.

In the early case of *Storrs* v. *The State*, 3 Mo., 9, (1831) Mr. Storrs was indicted for selling spiritous liquors and suffering such liquors to be drunk about his premises, without a license.

"Held, that the several acts of selling constituted but one offense, and therefore the indictment was not liable to the objection that distinct offenses are charged in the same count."

In *Lorton* v. *The State*, 7 Mo., 55 (1841), Mr. Lorton was indicted for stealing the goods and chattels of Richard Curle, and

at the same time was also indicted for stealing goods of one John B. Gibson.

> "Held, that the stealing of several articles of property at the same time and place, undoubtedly constitutes but one offense against the laws, and the circumstances of several ownerships cannot increase or mitigate the nature of the offense."

Cited with approval in the *The State* v. *Daniels*, 32 Mo., 558 (1862); *The State* v. *Wagner*, 118 Mo., 626 (1893) and *The State* v. *O'Connell*, 144 Mo., 393 (1898).

In *The State* v. *Maggard*, 160 Mo., 469 (1901), the property alleged to have been stolen consisted of overcoats, gloves, grain sacks, and various other goods and chattels belonging to five different persons, at the same time and place:

> "Held, the stealing of different articles of property, belonging to different persons at different times, constitutes different offenses, but where the stealing of different articles of property is at the same time and place so that the transaction is the same it is but one offense, although the property stolen may belong to different persons."

Cited with approval in the *The State* v. *Soper*, 207 Mo., 502, (1907).

In *State* v. *Egglesht*, 41 Iowa, 574, the defendant, at the same time and by the same act passed to the teller of a bank four forged checks. Judge Day held:

> "If the stealing of various articles owned by different individuals, constitutes as many distinct offenses as there are owners, then they cannot be united as one offense in the indictment. If one should at the same time, and as one act, steal two watches, each of the value of fifteen dollars, and

owned by different persons, and another should steal in the same manner two articles of like value owned by one person, it would be difficult to give a reason satisfactory to the legal mind why one should expiate his offense with a fine of two hundred dollars or imprisonment in the county jail for sixty days, whilst the other should be sent to the peniteniary for the period of five years.

If A should at one time, and as one act, hand to a merchant four counterfeit bills, each of the denomination of five dollars, and have the amount passed to his credit, and B should in like manner pass one bill of the denomination of twenty dollars, we would much doubt whether the "perfection of human reason" would be evinced in sending B to the penitentiary ten years for one crime, and A forty years for four crimes.

Or, suppose that the defendant, instead of passing to the bank four checks, amounting to $5,000, and procuring credit thereon, had paid over in a similar manner the said sum of $5,000 in bills, each of the denomination of five dollars, would it be claimed that he had committed one thousand criminal offenses each of which be punished by imprisonment for the term of ten years? Yet there can be no difference in principle between the passing of a counterfeit bank bill and the uttering of a forged check or draft. That the defendant, at each of the banks in question, committed but one offense, is well sustained by authority."

See also *The People* v. *Van Kuren* 5 Parker, C. R. 66; *State v. Benham,* 7 Conn., 414; *Furnace* v. *The State,* 153 Ind., 93; *State* v. *Colgate,* 31 Kansas, 511; *Nichols* v. *The Commonwealth,* 78 Mass., 180; *Wilson* v. *The State,* 45 Tex. Rep., 76; *State* v. *Williams,* 10 Hump., 101, *State* v. *Moore,* 86 Minn., 422; *The People ex rel. Tweed* v. *Liscomb, Warden,* 60 N. Y., 559, *The People* v. *Stephens,* 79 Cal., 428; *Fischer* v. *Commonwealth,* 1 Bush, 211, *State* v. *Larson,* 85 Iowa, 659; *Vining* v. *State,* 146 S. W., 909; *State* v. *Sampson,* 138 N. W., 473; *Commonwealth* v. *Prescott,* 153 Mass., 396; *Hurst* v. *State,* 86 Ala. 604.

III.

Sentences on five counts are void.

Mr. Ebeling arrived at the United States penitentiary, at Leavenworth, Kansas, May 21st, 1910, and the sentence on the second count commenced to run from May 20th, 1910. Under the Act of June 21st, 1902, he is entitled to credit for good conduct. Hence, the three years under the second count of said indictment, had expired before he applied to Judge Pollock for his release.

In *United States* v. *Pridgeon*, 153 U. S., l. c. 62, MR. JUSTICE JACKSON, laid down the following rule:

> "Without undertaking to review the authorities in this and other courts, we think the principle is established that where a court has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack. In other words, the sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence."

That is exactly what we contend in this case. We do not attack the sentence imposed on the second count, but only the sentences imposed under the third, forth, fifth, sixth and seventh counts as being void under the express terms of Article V of Amendments to the Constitution of the United States. The trial court had no

jurisdiction to inflict a punishment in respect of more than one of the counts.

Crepps v. *Durben, supra,*
In re Snow, supra, and cases cited under point 1.

IV.

Fines and costs civil liability only.

The sentence imposed under the second count of the indictment provides that Mr. Ebeling "make his fine to the United States by the payment of the sum of Five hundred ($500.00) Dollars, and also the costs of the prosecution of this cause to be taxed."

The sentences imposed under the third, fourth, fifth, sixth and seventh counts, in the same language, provide that Mr. Ebeling make his fine to the United States by the payment of the sum of Five hundred ($500.00) Dollars.

There is no statement in such judgment and sentences aforesaid, that Mr. Ebeling should stand committed until such fines and costs be paid. Consequently, they constitute a civil liability only, for which no imprisonment can be inflicted.

Sec. 1041, U. S. Comp. Stat. 1901.

In *ex parte Jackson,* 96 U. S., 727, Mr. JUSTICE FIELD held:

> "When a party is convicted of an offense, and sentenced to pay a fine, it is within the discretion of the court to order his imprisonment until the fine shall be paid."

Judge Dyer, in his discretion, did not commit Mr. Ebeling until such fines and costs be paid. Such fines and costs can only

be collected on execution. This point is conceded by Judge Pollock in his opinion.

V.

Involuntary servitude.

Section 1 of Article XIII of Amendments to the Constitution of the United States provides:

> "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

We respectfully submit that if all of said six counts of the indictment do not charge but one offense, for which only one punishment could be legally inflicted, and Mr. Ebeling has fully satisfied such sentence, he is now held in involuntary servitude, not as a punishment for crime, whereof he has been duly convicted, and compelled to work for the Government without any compensation. Judge Dyer had no authority or jurisdiction to impose but one sentence. The other sentences are *coram non judice.*

It is evident, however, that in imposing such sentences, Judge Dyer relied upon the rule laid down by Judge McCrary, in cases of *Ex parte Peters,* 12 Fed., 461, and 4 Dill., 169. The indictment contained four counts. The first count charged Mr. Peters with burglary, in breaking and entering the building used as a postoffice at Bucklin, Linn county, Missouri, with intent to commit larceny, October 28, 1874. The second count charged him with larceny, committed at the same time and place. The third count charged him with burglary, in breaking and entering the building used as a

postoffice at Unionville, Putnam county, Missouri, with intent to commit larceny, November 12, 1874. The fourth count charged him with larceny, committed at the last mentioned time and place. There was a plea of guilty upon all counts and he was sentenced to imprisonment for a term of two years upon each count, to run consecutively. After having served two years, he applied for a writ of habeas corpus, which was denied, the court being of the opinion that at least two distinct offenses were charged, one in the first and one in the third count. When the four years had expired, he again filed his application for such writ. The application was again denied by Judge McCrary, in which Judge Krekel concurred. Judge McCrary, however, said:

> "The opposite view was ably stated by Waite, C. J., in his dissenting opinion in *Wilson* v. *State*, 24 Conn., 57, and his reasoning is so strong that if it were a question of first impression, I should be inclined to adopt his opinion. Looking, however, to the adjudicated cases, I find the law very well settled against the position assumed by the counsel for petitioner."

In case of *Munson* v. *McClaughry, Warden, supra,* the Circuit Court of Appeals of the Eighth Circuit criticizes the opinion in the Peters case, as follows:

> "Judge McCrary evidently overlooked the clear distinction that had been made by the Massachusetts decisions between the offenses of burglary and larceny when they were distinct and separate in time, place and act, and burglary and larceny that were parts of the same continuous criminal act, and upon this mistake was founded the decision which he rendered against his own better judgment in *Ex parte Peters.*"

Mr. Justice Gray, in *United States* v. *Petit,* 114 U. S., l. c. 429, said:

"Imprisonment at hard labor, compulsory and unpaid is, in the strongest sense of the words, 'involuntary servitude for crime,' spoken of in the provision of the ordinances of 1787, and the Thirteenth Amendment to the Constitution, by which all slavery was abolished."

VI.

Six times in jeopardy, due process of law.

Article V of Amendments to the Constitution of the United States, provides in part:

> " * * * Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. * * *
> Nor shall be deprived of life, liberty or property without due process of law. * * * "

With all due respect for Judge Dyer, we respectfully submit that in the passing of such judgments and sentences, he violated the express terms of both of these great constitutional guarantees. The record in this case conclusively shows that Mr. Ebeling has been subjected, for the same offense, to be put in jeopardy six times.

By the term "due process of law," is meant the "law of the land." There is no law in the land which authorizes the punishment of any person six times for the same offense.

"Nemo bis punitur eodem delicto."

VII.

Judge Pollock erred in denying application.

Through the courtesy of Judge Pollock and his efficient secretary, we have been favored with a copy of his opinion. We herewith produce same in full:

"In the District Court of the United States for the District of Kansas. First Division.

IN THE MATTER OF THE APPLICATION OF
GEORGE EBELING FOR WRIT OF HABEAS CORPUS.
No. 1504.

MEMORANDA OF DECISION.

(Transcript of Record, 44-51.)

Petitioner was indicted, pleaded guilty and was sentenced on six counts in an indictment charging him with violations of §189 of the Code of Criminal Procedure, which reads as follows:

'Whoever shall tear, cut, or otherwise injure any mail bag, pouch, or other thing used or designed for use in the conveyance of the mail, or shall draw or break and staple or loosen any part of any lock, chain, or strap attached thereto, with intent to rob or steal any such mail, or to render the same insecure, shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both.'

On five of the counts he was sentenced to three years in the Federal penitentiary and to pay a fine of five hundred dollars on each count, said sentences of imprisonment to run cumulatively. On the remaining count, charging a violation of such statute, he was sentenced to three years imprisonment in the penitentiary, the same to run concurrently with the terms of imprisonment imposed under the preceding five counts. Thus the aggregate sentence imposed upon petitioner was fifteen years imprisonment in the Federal penitentiary at Leavenworth, a fine of twenty-five hundred dollars, and costs of the prosecution. However, as petitioner was not adjudged to stand committed until the fine and costs were paid, such portion of the judgment may be omitted from consideration of the matter here presented. (*Ex parte Jackson*, 96 U. S., 727.) Petitioner having served the full period of three years, the ut-

must length of imprisonment within the power of the court to impose for a single violation of the statute, has filed his application for writ of habeas corpus praying his release from further imprisonment.

This application is based on the ground the indictment although in several counts, in legal effect charges but one violation of the act above quoted, hence, it was not within the jurisdiction or power of the trial court to impose a greater punishment by way of imprisonment than is permitted by the statute, three years, which he has already undergone. Hence the remainder of the term of imprisonment is *coram non judice*, and void.

As all the registered mail pouches specifically described and manifested in the several counts of the indictment were cut into as a part of the same criminal transaction, were located in the same place, if under the terms of the act properly construed, such transaction constituted but one completed offense, it is evident the court was without power to impose more than one three-year term of imprisonment under the statute, and in consequence the remainder of the term is void and the writ must be granted. (*In re Snow*, 120 U. S., 274; *Ebra Nellum, Petitioner*, 131 U. S., 176; *Halligan* v. *Wayne*, 179 Fed., 112; *Munson* v. *McClaughry*, 198 Fed., 72; *Stevens* v. *McClaughry*, 207 Fed., 18.)

However, if, as contended by the Government, and as manifestly held by the trial court in imposing the punishment against petitioner, each single isolated act of cutting into the several registered mail pouches described in the indictment, with the intent in his mind of stealing therefrom the contents of such pouches, constituted a separate and independent violation of the act, then the judgment is valid in its entirety and the writ must be denied.

That is to say, the question presented by the application for the writ and response of the Warden thereto, is this: Under the act in question, does he who cuts into many registered mail pouches containing registered mail, with the intent of stealing the contents of all of such sacks, violate the statute in any larger sense or incur liability to any greater punishment therefor than he who, with like intent, cuts open but one such pouch?

A reading and consideration of the act renders it quite clear the purpose of the law-making power in the enactment thereof was not to protect the government in its property rights in the receptacles used or designed for the transportation of the mails from despoilment, but to secure protection for the mails therein contained.

Again, in affording such protection to the mails, Congress did not deem it sufficient to provide in general terms against anyone robbing or attempting to rob a person in possession of such mails, or against stealing or attempting to steal the mails from such receptacles or from cutting or tearing into such receptacles for mail, or attempting to cut or tear into the same. On the contrary, the statute in express terms condemns the act of cutting, tearing or in any like manner injuring any mail pouch or sack with intent of stealing or rendering the mailable matter therein insecure. In other words, the overt act done which is prohibited is the cutting or injuring of the container of the mail matter. The criminal intent which must accompany the doing of the prohibited act is the larceny of or the rendering insecure of the mail matter contained in the pouch or sack.

Under such legislative act is a completed and punishable offense committed by the cutting, tearing or injuring of each separate mail sack or mail pouch, if the act of cutting or tearing be accompanied by the prohibited intent, although the successive forbidden acts of cutting or tearing follow each other in such rapid succession as to form one continuous chain of events?

No construction of the act in question by any court has been found. It has been held that the burglary of a postoffice building with intent to commit larceny therein, and the actual commission of the intended larceny constitute but one punishable offense, and that of either burglary or larceny as the Government may elect. (*Munson* v. *McClaughry, supra.*) The larceny of a registered mail pouch and its contents, however numerous the parcels may be, and the embezzlement of such contents, constitute but one offense. (*Stevens* v. *McClaughry, supra.*) The wounding or killing of two or more persons by the firing of one shot constitutes but one offense. (*State* v. *Damon*, 2 Tyler, 387; *Clem* v. *The State*, 42 Ind., 420; *Ben* v. *The State*, 22 Ala., 9.) That an act prohibiting Sunday

labor is violated to no greater extent by the sale of six loaves of bread than by the sale of one. (*Creppe* v. *Durden*, Cowper, 640.) That the larceny of goods belonging to different individuals done at the same time and place constitutes but one offense. (*Nichols* v. *Commonwealth*, 78 Mass., 180; *Wilson* v. *State*, 45 Texas, 76; *State* v. *Williams*, 10 Humph., (Tenn.) 101; *Lorton* v. *The State*, 7 Mo., 55; *State* v. *Morphin*, 37 Mo., 373.) That one tried and either convicted or acquitted of arson in the burning of a mill may not be thereafter tried for the burning of the contents of the mill. (*State* v. *Colgate*, 31 Kan., 511.)

On the contrary, it has been held the passing of two counterfeit bills at different times, although made from the same plate, constitutes two separate and independent offenses and may be punishable as such. (*United States* v. *Randenbush*, 8 Pet. (U. S., 288). That under the provisions of section 211 of the Penal Code, each particular letter, packet or other non-mailable matter knowingly deposited in the mails, or taken therefrom, constitutes a separate offense. Under the provisions of section 215 of the Code, each separate letter or other writing mailed or taken from the mails in aid of a scheme to defraud, constitutes a separate offense. Under statutes prohibiting the sale of intoxicating liquors, each sale so made constitutes separate offenses, etc.

Mr. Bishop, in his work on Criminal Law, 7th Ed., sec. 1051, lays down certain rules deducted from the very reason of the matter for the determination of the question here presented, as follows:

'Looking further to see when the offences are the same, we have, in reason, the following propositions: They are not the same, first, when the two indictments are so diverse as to preclude the same evidence from sustaining both; or, secondly, when the evidence offered on the first indictment, and that intended to be offered on the second, relate to different transactions, whatever be the words of the respective allegations; or, thirdly, when each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction, a proposition of which the exact limits are difficult to define; or, fourthly, when some technical variance precludes a conviction on the first indictment, but

permits it on the second. Yet, fifthly, the offences are the same in all other circumstances wherein the evidence to support one of the judgments sustains also the other. And, sixthly, if the two indictments set out offenses which are alike, and relate to one transaction, yet, if one contains more of criminal charge than the other, but upon it there could be a conviction for what is embraced in the other, the offences, though of differing names, are, within the constitutional protection from a second jeopardy, the same.'

Applying the foregoing rules to the case at bar, it is evident from a reading of the several counts of the indictment to which petitioner pleaded guilty, and under which he stands committed, all the registered mail pouches cut into by him were located in the same railway postal car, and as all are charged to have been by him cut into on the same day at the same place and in the same postal car, it is fair to assume the separate acts of cutting into the pouches done by him followed each other in such rapid succession as the exigencies of the operation would admit. Again, each separate act of cutting into said pouches was actuated by the same general character of criminal intent, viz., to steal the contents of the sacks cut into. Hence, the entire operation of petitioner in the transaction will be assumed to have been continuous in point of time. However, within the true intent and meaning of the foregoing rules and the many adjudicated cases, this continuous operation or transaction of petitioner in reason must be regarded as constituting more than one offending against the statute involved in this controversy, and for the following reasons: (1) In order to prove the guilt of petitioner in cutting into registered mail pouch, Lock No. X9661, Rotary No. 441, as described and charged in count two of the indictment, with the intent of stealing the contents thereof, it was neither incumbent upon nor necessary for the Government in any way or manner to refer to the existence, location or description of registered pouch Lock No. 11779, Rotary No. 252, described in the third count in the indictment, or to make any reference to the numbering of the locks or other description of any other registered pouch described in any succeeding count of the indictment; (2) while the nature of the intent in the mind of petitioner at the time each successive registered pouch was by him cut into was similar in kind, it was not identical, for at

each successive act of cutting into a pouch it was incumbent upon the government to prove (if not as in this case admitted) the intent of petitioner to steal the contents of such particular registered pouch was present in his mind; (3) had the Government failed to prove petitioner cut into any pouch as particularly described and numbered in any count of the indictment with the intent to steal the mail from such pouch, while such failure of proof would have had no effect whatever upon the question of the guilt or innocence of petitioner under any other count of the indictment, he could not, without such proof, have been convicted of the particular offense specifically described in such count; (4) while the act of petitioner in cutting into the several separate, independent, distinct and particularly described registered pouches, as are charged in the separate counts of the indictment, was not, as a matter of course, a burglarious act, yet, the act of cutting, tearing or other like injuring done for the purpose of entering into such pouch to steal the contents thereof prohibited by the statute in question is quite nearly related in its nature to the act of burglarizing a building; and while, as has been seen, it has been held the acts of breaking into a building with the intent to commit therein larceny, and the actual commission thereafter of the intended larceny constitutes but one punishable offense, either the burglary or the larceny committed, as the prosecution may elect, yet, in the very reason of things it cannot be held the successive breaking into of many separate buildings by the same person, with the intent to commit larceny therein, does not constitute more than one offense of burglary, no matter how quickly in point of time the one act of breaking may follow the other, or that the entire transaction may be regarded as one continuous criminal enterprise, for the doing of which but one punishment could be imposed on the wrongdoer.

Mr. Chief Justice Waite, delivering the opinion of the court *In re Henry*, 123 U. S., 373, said:

'As was well said by the district judge on the trial of the indictment, "the act forbids, not the general use of the postoffice for the purpose of carrying out a fraudulent scheme or device, but the putting in the postoffice of a letter or packet, or the taking out of a letter or packet from the postoffice in furtherance of such a scheme. Each letter so taken out or put in constitutes a separate and distinct violation of the act."

It is not, as in the case of *In re Snow*, 120 U. S., 274, a continuous offense, but it consists of a single isolated act, and is repeated as often as the act is repeated.'

In principle, I think the present case is controlled by the rule there announced, that each act of petitioner in cutting into each several registered pouch was a single, isolated, punishable act, repeated as often as the act was repeated.

It follows, as by the very terms of the statute in question, the law making power evidently attempted to and did make criminal the isolated act of cutting into each one of the particularly described registered pouches, as set forth in the indictment on which petitioner was tried and convicted, as such cuttings were done with the prohibited intent, the several counts of the indictment to which he pleaded guilty constitute not a single offense but separate punishable offenses.

In consequence, the judgment imposed, under which the petitioner stands committed, was within the jurisdiction of the court and the writ must be denied.

It is so ordered.

JOHN C. POLLOCK, *Judge*.

Kansas City, Kansas.
February 13th, 1914."

Judge Pollock concedes that as all of the six registered mail pouches were cut into as a part of the criminal transaction and were located in the same place, if under the terms of the Act properly construed, such transaction constituted but one completed offense, it is evident that the court was without power to impose more than one three-year term of imprisonment, under the statutes, and in consequence, the remainder of the term is void and the writ must be granted.

In the original application for a writ of habeas corpus, verified by oath, the appellant alleges:

"Your petitioner further states that all of such acts, set forth in the second, third, fourth, fifth, sixth and seventh

counts of said indictment, constitutes but one continuous criminal act, with only one criminal intent on the part of your petitioner."

This allegation is not traversed by the return of the Warden. Hence, it stands admitted. Nevertheless, Judge Pollock denied the writ, on the theory that each isolated act of cutting into the several mail pouches, described in the indictment, with the intent, in his mind, of stealing therefrom the contents, constituted separate and independent violations of the said Act.

It is self-evident that Judge Pollock, in denying said application, relied on the rule *In re Henry*, 123 U. S., 372, based on Section 5480 of the Revised Statutes, being Act of June 8, 1872, which provides:

> "If any person having devised or intended to devise any scheme or artifice to defraud, or be effected by either opening or intending to open correspondence or communication with any other person, whether resident within or outside of the United States, by means of the Post Office Establishment of the United States, or by inciting such other person to open communication with the person so devising, or intending, shall, in and for exacting such scheme or artifice, or attempting so to do, place any letter or package in any Post Office of the United States, or take or receive any therefrom, such person, so misusing the Post Office Establishment, shall be punishable by a fine of not more than five hundred dollars, or by imprisonment for not more than eighteen months, or by both such punishments. *The indictment, information or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the Post Office Department enters as an instrument into such fraudulent scheme and devise.*"

Mr. Henry was indicted for violating this section. The in-

dictment charges three separate and distinct offenses, all alleged to have been committed within the same six calendar months. Under this indictment he was tried, convicted and sentenced to imprisonment for twelve months. Afterwards he was indicted for three other and different offenses, under the same statutes, committed within the same calendar months. To this indictment he pleaded his conviction upon the first indictment in bar. This plea was overruled, and upon a trial he was convicted and sentenced to imprisonment for fifteen months, upon the determination of the former. Having served out the first sentence, he sought his release on habeas corpus, on the theory that the court had no jurisdiction to inflict a punishment for more than one conviction of offenses under the statute, committed within the same calendar months. This court very properly held that each letter or packet put in or taken out from the Post Office of the United States, in violation of said section, constituted a separate and distinct violation of said Act.

Section 5480 was amended by Act of March 2, 1889, c. 393, No. 1. Comp. St., 1901, p. 3696, and again by Act of June 4, 1909, c. 321, No. 215, 35 Stat. 1130, Comp. St. Spp., 1911, p. 1653, by the terms of which the punishment was increased to a fine of not more than one thousand dollars, or imprisonment not more than five years, or both, and everything from "the indictment" to "scheme and devise," contained in said section 5480, printed in italics, were stricken out.

With all due respect for Judge Pollock's legal ability, we fail to see anything in the Henry case to justify denying the appellant's application.

VIII.

Judge Pollock's contention is erroneous.

Judge Pollock's contention is erroneous.

We respectfully submit that Judge Pollock's contention that

the cutting, tearing and injuring of each separate and distinct mail pouch, with intent to feloniously rob, steal and carry away the contents thereof, at the same time and place and as part of one continuous criminal act, constitutes six separate and isolated offenses, for which six separate and distinct punishments could be inflicted, is erroneous.

Judge Pollock took the unique position that as section 189 of the Criminal Code provided that, *"Whoever shall tear, cut or otherwise injure any mail bag, pouch or other thing used or designated for use in the conveyance of the mail,"* the Congress, by using the word *"ANY"* intended that the cutting, tearing and injuring of each and every mail bag, pouch or other thing used or designated for use in the conveyance of the mail, should constitute a separate and distinct offense. This is a most violent presumption. What the statute means is simply that the law places its protection around each and every kind of mail bag, pouch or other thing used and designated for use in the conveyance of the mail. The word "any" is the broadest and most comprehensive word in the English language. It is used in nearly all of the sections of the Criminal Code.

If Judge Pollock's contention be correct, then it follows that if a person steals several articles at the same time and place, he can be punished for the taking of each and every article stolen, which we have heretofore shown is not the law.

Crepps v. *Durden, supra,* and cases cited under points 1, 2 and 7.

IX.

Motion for judgment should have been sustained.

The appellant, in his application for a writ of habeas corpus,

set forth certain statements of fact. The return of the respondent does not traverse any of such allegations of fact. The appellant thereupon filed his motion for judgment notwithstanding the return. This motion should have been sustained.

X.

Served valid portion of sentence.

The appellant arrived at the United States penitentiary on the 21st day of May, 1910, in execution of the said judgment and sentence. The first sentence under the second count of the indictment, was for a period of three years. He had served the sentence in full, before he filed his application for a writ of habeas corpus. Judge Pollock concedes that he could not have been imprisoned for the nonpayment of the fine and costs. In fact, Judge Pollock concedes that if all such transactions constitute but one offense, the writ must issue. Nevertheless, he denied the application and refused to issue such writ of habeas corpus.

From such decision, the appellant perfected an appeal direct to this Honorable Court, on the ground that the imprisonment of the appellant is in violation of the Constitution of the United States.

Craemer v. *Washington State,* 168 U. S., 124;
Dimmick v. *Tompkins,* 194 U. S., 546.

ARGUMENT.

May it Please Your Honors:

Section 189 of the Criminal Code of the United States provides that *"Whosoever shall tear, cut, or otherwise injure any mail bag, pouch or other thing used or designated for use in the conveyance of the mail * * * with intent to rob or steal any mail, * * * shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both."*

In the present case, six separate and distinct mail pouches were torn, cut and injured, at the same time and place, and as one continuous criminal act. Upon a plea of guilty, Judge Dyer imposed the maximum punishment upon the appellant, not for one offense, but for six offenses, to run consecutively.

Now, what object did appellant have in so tearing, cutting and injuring the six mail pouches? That question is answered in each count of the indictment, "* * * with intent to rob, steal and carry away the contents of such mail pouches. * * *" Hence, there could be only one intent. How in the name of common sense such intent could be divided into six separate and distinct intents, is above comprehension. Permit us to illustrate:

Section 4548 of the Revised Statutes of Missouri, 1909, makes the stealing of any personal property, under the value of thirty dollars, petit larceny, punishable by imprisonment in the county jail not exceeding one year, or by a fine of not more than one hundred dollars, or by both such fine and imprisonment. It is cognizable before justices of the peace. Now, suppose that a person should, at the same time and place, steal twenty-nine silver dollars. Instead of charging the thief with one offense, petit larceny, the prosecuting attorney should file an information, in twenty-nine counts, for stealing one silver dollar. The defendant would enter a plea

of guilty, as charged in each count. Would even a justice of the peace, who is not supposed to know the law, attempt to sentence such defendant to pay a fine of twenty-nine hundred dollars, and imprisonment in the county jail, for twenty-nine years? The Supreme Court of Missouri, on seven different occasions, has held that the stealing of several articles of property, at the same time and place, constitutes but one offense. However, according to Judges Dyer and Pollock's theory, he would have committed twenty-nine separate and isolated offenses, and have been subject to twenty-nine punishments.

We are unable to understand how the rule in the Henry case can be any authority for denying the application in the case at bar. As stated under Point VIII, the Henry case was based upon a statute which authorized three separate offenses, committed within the same six calendar months, to be included in one indictment. That section (5480 R. S.) specifically provided that the court should give a single sentence, and should proportion the punishment especially to the degree in which the abuse of the Post Office Establishment entered as an instrument into such fraudulent scheme and devise. Had the court, in the Henry case, imposed six sentences (maximum) another proposition of law would have presented itself. Under Henry's construction of the law, if he committed three offenses during a period of six calendar months, he would not, during the same period, commit any other crime. Vaccination may be a good preventative of contagious diseases, but we have never known that the commission of one crime is a sure cure against the commission of another, during the same period of six calendar months, or any other period of time. We respectfully submit that the Henry case is no authority for denying the application in this case.

On the other hand, the early case of *Crepps* v. *Durden,* is sound law. Crepps was convicted, by four separate convictions, of selling small, hot loaves of bread, the same not being any work of

charity, on the same day, being a Sunday. *Lord Mansfield* said that it was but one entire offense, whether longer or shorter in point of duration. This decision was handed down in 1777, is quoted with approval in case of *In re Snow,* 120 U. S., l. c. 283-4, and we have failed to find the correctness of the rule questioned.

In re Snow: He was convicted on three indictments, covering a period of one year each, for violating section 3 of an Act of March 22, 1882, which prohibits any male person from co-habiting with more than one woman. He was convicted of cohabiting with more than one woman, to-wit: With Adeline Snow, Sarah Snow, Elenor Snow, Mary H. Snow, Phoebe W. Snow and Minnie Jensen Snow. The first indictment covered a period from January 1, 1883, and continuously until December 31, 1883. The second indictment covered a period from January 1, 1884, and continuously until December 31, 1884. The third indictment covered a period from January 1, 1885, and continuously until December 1, 1885. He was sentenced to imprisonment for a period of six months and to pay a fine of $300, in each case, to run consecutively. After having satisfied the sentence under the first indictment, he brought habeas corpus proceedings in the United States District Court, where the application was denied. Thereupon he appealed to this court. This court held:

> *"There can be but one offense between such earliest day and the end of the continuous time embraced by all the indictments. Not only has the court which tried them no jurisdiction in respect of more than one of the convictions, but, as the want of jurisdiction appears on the face of the judgment, the objection may be taken on habeas corpus, when the sentence on more than one of the convictions is sought to be enforced."*

To the same effect is the case of *In re Nielson.*

In *Munson* v. *McClaughry, Warden,* 198 Fed., 72, the United States Circuit Court of Appeals of the Ninth Circuit held:

"A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into, or breaks into a postoffice building with intent to commit larceny therein, and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing criminal act."

This rule has been affirmed in case of *Stevens* v. *McClaughry, Warden*, 207 Fed., 18, and *O'Brien* v. *McClaughry, Warden*, 209 Fed., 816.

Now, by all process of reasoning, we are unable to comprehend how this appellant could have committed six offenses, by tearing, cutting and injuring six mail pouches, with intent to rob, steal and carry away the contents of such mail pouches, when, if in perpetuating such offense, he had also committed burglary, he would have been guilty of but one offense.

On the contrary, we believe that Judge Somerville's opinion in case of *Hurst* v. *The State*, 86 Ala., 640 is sound law, where he asked:

"If one should cast a stone into a crowd and wound a dozen men at one blow, is he liable to a dozen indictments? If he burns a hundred houses, by one act of arson, knowing the probable consequences of his unlawful act, would he be guilty of a hundred crimes? Or should he blow up a hotel with dynamite, murdering a thousand guests, would he be separately liable for the perpetration of a thousand homicides?"

This Honorable Court, in case of *United States* v. *Pridgeon*, 153 U. S., l. c., 62 laid down this rule:

"Without undertaking to review the authorities in this and other courts, we think the principle is established that where a court has jurisdiction of the person and the offense,

the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack. In other words, the sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person or offense, and only void as to the excess, when such excess is severable, and may be dealt with without disturbing the valid portion of the sentence."

This Honorable Court, in the early case of *Ex parte Lange*, 18 Wall., 163, laid down this rule:

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the rights of the individual which have for ages received the sanction of the jurist and the statesman; and in such cases no narrow or illiberal construction should be given to the words and the fundamental law in which they are embodied."

It will not do to say that the appellant is only a convict, and is entitled to no consideration. The eminent jurist, Judge Kennish, speaking for the Supreme Court of Missouri, in banc, in *Ex parte Creasy*, 248 Mo., 707, said:

"The Constitution guards the liberty of the felon with the same eagle eye that it does the infant and the pure girl. In each case, where unlawful detention is charged, the facts of the detention must be laid bare."

We respectfully submit that the judgment and sentence, imposed under the third, fourth, fifth, sixth and seventh counts of said indictment, should be declared *coram non judice* and void; that the order rendered by Judge Pollock on the 13th day of February, 1914, denying the application for a writ of habeas corpus, should

be set aside; that said cause should be reversed and remanded to the United States District Court of Kansas, with directions to award the appellant a writ of habeas corpus, and for such other and further relief as to this Honorable Court may seem just and equitable.

Respectfully submitted,

FRANS E. LINDQUIST,
Attorney for Appellant,
Kansas City, Missouri.

WILLIAM P. BORLAND,
MARTIN J. OSTERGARD,
CHARLES S. MCLANE,
EDWIN J. SHANNAHAN,
OSCAR F. WIMMER,
HERMAN D. KISSENGER,
LEONARD WADDELL,
LUTHER N. DEMPSEY,
IRA S. GARDNER,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

GEORGE EBELING, APPELLANT,
v.
T. W. MORGAN, WARDEN OF THE UNITED States Penitentiary at Leavenworth, Kansas. } No. 736.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR APPELLEE.

STATEMENT.

This appeal presents a single question: Has one who, in continuous action, cuts open *six* mail bags, with intent to rob them of their contents, committed *six* offenses or only *one*, under section 189 of the Penal Code, reading:

> SEC. 189. Whoever shall tear, *cut*, or otherwise injure *any mail bag*, pouch, or other thing used or designed for use in the conveyance of the mail, or shall draw or break any staple or loosen any part of *any lock*, chain, or strap *attached thereto*, with *intent* to *rob* or steal *any such mail*, or to *render* the *same insecure*,

> shall be fined not more than five hundred dollars, or imprisoned not more than three years, or both.

Appellant was indicted upon six counts, each one charging him with cutting a different mail bag (giving separate lock and rotary number in each instance) with intent to steal the contents *thereof*. Upon his plea of guilty the court pronounced cumulative sentences of $500, costs, and three years' imprisonment at Leavenworth upon all six counts. The appellant, claiming the right to be released after serving the first sentence, applied for a writ of *habeas corpus*, which was denied. The facts appear more fully in the "Memoranda of decision" by the court. (R., pp. 26–30.)

ARGUMENT.

I.

The unit of offense under section 189 is the breaking into the mail bag with intent to rob *it* of *its* contents.

He who forcibly breaks into two post offices with intent to commit larceny in each commits two offenses under section 192 of the Criminal Code. On the other hand, he who, in assaulting a mail carrier, strikes seven blows is not guilty of seven offenses under section 197. The case at bar rests somewhere between these two extremes.

If section 189 is aimed at specific acts, then each act is punishable separately; if aimed only at a *course* of *action* made up of acts, there can be but

a single penalty. (Wharton, *infra.*) The precise act of striking the mail carrier, whether it be one blow or a dozen, is not the prohibited element of transgression under section 197. It is rather the assaulting of this custodian with intent to rob the mails. The unit of violation is the custodian, not the part of the body on which each successive blow may fall. On the other hand, when two mail carriers are successively knocked unconscious by the same assailant and each is relieved of the mail matter intrusted to his care, this not only allows, but demands, separate punishments. Robbing one mail carrier gives the robber no constitutional immunity to rob another standing by, any more than if the second had been encountered in a distant block or town. The statute protects the man carrying mail, not men generally, nor postal property, nor mail matter generally. Section 190, forbidding stealing any property, is the general protective statute. We may admit that under the latter he who steals three chairs from the post office commits but one offense. We do not specially depend on the words "any mail bag" in section 189. The basis of our contention is more fundamental. It is, that the mail bag is a recognized unit of deposit in the handling of the mail as much as the letter carrier, the mail car, or even the post office itself.

The distinction between *cutting open* and *stealing the* mail *bag,* is significant. By feloniously carrying away a dozen bags from a single pile, by aid of a single baggage truck, but one offense would be com-

mitted. If he could thereafter rifle their contents without tearing, cutting, or injuring them, and without loosening any lock, he would escape with but a single penalty; but if to secure its contents he must forcibly open any bag, then, because each opening further imperils the mail contents of that bag, he must endure a further penalty therefor.

Section 193 makes it an offense to enter by violence a postal mail car. In that case, the unit of offense is the car; and though several mail cars were in a single train, terminal yard, or station, or upon one track or division, none the less would the forcible entering of each be a separate offense. Each, the post office, the postal car, and the postal bag, is alike a separate receptacle used in safeguarding the mail. Each has its own lock, provided as one of the units of security for its own mail contents. Until each receptacle is forced open, the mail matter therein is inviolate; and a separate act of mutilation or breaking is required to give access to the mail contents of each.

Though the question of unit of violation has often been before this court, each new set of facts, under a new statute presents an original problem. Authorities, therefore, are of value only as they aid in developing the theory upon which the instant case should be decided.

In I Wharton's Criminal Law (11th Ed.), sec. 34, it is said:

> The distinction is this: When the impulse is single, but one indictment lies, no matter

> how long the action may continue. *If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.*

This simply redefines the problem in new terms. The inquiry still is, when are "successive impulses * * * separately given"?

In note 3, p. 49, the author more specifically announces the test to be:

> * * * whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. * * * If the latter, there can be but one penalty.

Wharton cites, *In re Hartley*, 31 L. J. Mag. Cas. N. S. 232, in which, under the public health act of 1848, imposing a penalty for "every piece of meat" found to be "unfit for the food of man," it was held that each exposure of a piece of bad meat was a separate offense.

Section 189 was not aimed at the *course of action* of cutting open mail bags, but rather at the specific act of gaining access by force to any receptacle in which mail is conveyed.

In *In re Henry*, 123 U. S. 372, 374, this court quoted with approval language of the trial judge as follows:

> the act (forbidding use of mails in scheme to defraud) forbids, not the general use of the post office for the carrying out a fraudulent scheme or device, but the putting in the post office of a letter or packet, or the taking out of a letter or packet from the post office in

> furtherance of such a scheme. *Each letter so taken out or put in constitutes a separate and distinct violation of the act.*

In *United States* v. *Clark*, 125 Fed. 92, 93, and *Walker* v. *United States*, 152 Fed. 111, 113 (both involving the scheme-to-defraud statute), and *Chadwick* v. *United States*, 141 Fed. 225, 247 (conspiring to violate the National Banking Act by the unlawful certification of numerous checks), the rule of *In re Henry, supra*, was followed.

The case of *B. & O. S. W. R. R.* v. *United States*, 220 U. S. 94, 103, when properly distinguished, makes for and not against the Government's present position. The following language of the act of June 29, 1906 (34 Stat. 607, 608), was involved:

> SEC. 1. That no railroad * * * shall confine the same * * * (animals in transit in interstate commerce) in cars * * * for a period longer than twenty-eight consecutive hours without unloading * * * for rest, water, and feeding, etc.
>
> * * * In estimating such confinement, the time consumed in loading and unloading shall not be considered, etc.
>
> SEC. 3. That any railroad * * * shall for every *such failure* be liable, etc.

The brief for the Government disclosed that four theories as to the "unit of offense" under this statute had, at different times, been suggested, to wit: The individual animal, the carload, the trainload, and the particular loading (p. 100). The court read the statute as aimed only at the latter, and said:

And the company contends that as the cattle here were in one train the failure to unload was one offense punishable by one penalty * * * (103).

Here the 21 cars loaded at different periods had been gathered into one train. As the period of lawful confinement of the cattle first loaded expired there was a failure to unload. For that failure the statute imposed a penalty; but there was then no offense whatever as to the animals in the other 20 cars of the same train which up to that time had not been confined for 28 hours. When, however, later in the day, at the same or a different place, the time for a lawful confinement of animals in the other 20 cars successively expired, there were similar but distinct and separate failures then and there to unload. They were separately punishable, since the provision that "for *every such* failure" the company shall be liable to a penalty, prevented merger. * * * (104).

Several expressions in the statute, and particularly the provision that in estimating the period of lawful confinement "the time consumed in loading and unloading shall not be considered," recognize that the proper loading or unloading of a number of animals may be treated as a single act, and there is nothing to indicate that it is to be treated as more than one act because the animals happen to belong to different persons. * * *

To illustrate: It appears in this record that several hundred animals belonging to one owner and consigned to one dealer were loaded

> into four cars at the same time. The 28 hours of their lawful confinement necessarily expired at the same time. The simultaneous failure to unload these four cars was single and punishable as a single offense (104, 105).

Thus the court interpreted the statute on the theory of "unit of offense," and having determined that this consisted of the specific failure to unload all that had been loaded at a single time and place, it rejected the trainload theory and adopted the single-loading theory. Had the statute been aimed at the individual animal rather than a single loading, it would have in turn held the failure as to each animal to constitute a separate offense.

The case at bar is very different from the cases relied upon by the petitioner, of which *In re Snow*, 120 U. S. 274, is a fair example. In that case defendant was charged in three indictments with cohabiting with more than one woman, each indictment specifying a different period but naming the same women. This court held that the three indictments charged but one offense because *that offense was continuous in its character.*

Infraction of the statute in the Snow case involved a progressive and indeterminate course of action. In our case no such undetermined period of conduct is the unit of violation. Wholesale slashing of canvas or smashing of hardware was not, while cutting the *individual* mail bag was, forbidden. The case is like that of sales of uninspected beer where each sale is held to be a separate offense. *State* v. *Broeder*, 90

Mo. App. 169; *State* v. *Heard*, 107 La. 60; *State* v. *Shafer*, 20 Kans. 226; *Benson* v. *State*, 44 S. W. 168 (Tex. Cr. App. 1898).

In *People* v. *N. Y. Central Co.*, 13 N. Y. 78, the statute required railroad trains to signal at crossings with a penalty "for neglect of this provision." It was held that a separate offense could occur at each crossing on a single trip.

In *Chicago etc. R. Co.* v. *People*, 82 Ill. App. 679, the statute prohibited the obstruction of a highway with penalty "for each such offense." A single train extended across and obstructed *several* highways at the same time. It was held a separate offense for each highway so obstructed.

In *Southern R. Co.* v. *State*, 165 Ind. 613, the statute required the railroad company to register on a station blackboard the time of expected arrival of the trains at that station, and fixed a penalty "for each such violation." The failure to register each of 404 trains arriving during a period of about 4 months was held a separate offense.

II.

The unit of offense being the breach of a bag, there can be no identity of offense in the breach of successive bags.

There is almost identity of time and actual identity of place. Beyond this no material feature of one crime is present in any of these successive crimes. The intent to rob is related separately to each particular bag and the breaking is of a single bag as

distinguished from all others. The case is analogous to successive burglarious entries into different houses accomplished in succession during the same night. In each there is criminal entry into a distinct physical object and with a criminal purpose, limited to matter contained entirely within that object. Thus interpreting the statute, the case comes squarely within the rule of non-identity of offenses declared by this court in *Carter* v. *McClaughry*, 183 U. S. 365, 394; *Burton* v. *United States*, 202 U. S. 344, 377; *Gavieres* v. *United States*, 220 U. S. 338, 342, 343, 344.

CONCLUSION.

The cumulative sentences were legal and the judgment of the court below refusing the writ was correct and should be affirmed.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

APRIL, 1915.

○